

A
T R E A T I S E
ON THE LAW OF
BILLS OF EXCHANGE,
CHECKS ON BANKERS,
PROMISSORY NOTES,
BANKERS' CASH NOTES,
AND
BANK-NOTES.

BY JOSEPH CHITTY, ESQ.
OF THE MIDDLE ~~TEMPLE~~ TEMPLE.

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1799.



TO
WILLIAM TIDD, ESQ.

THIS TREATISE IS DEDICATED,
AS A
TESTIMONY OF RESPECT FOR HIS TALENTS,
AND AN
ACKNOWLEDGMENT OF GRATITUDE
FOR THE
GREAT OBLIGATIONS WHICH HIS FRIENDSHIP,
AND
HIS PROFESSIONAL INSTRUCTIONS,
HAVE CONFERRED ON
THE AUTHOR.

WILLIAM TILDEN

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P R E F A C E.

THE Author of the following Treatise, in attempting a systematic arrangement of the subject, has divided it into two parts: in the first, the *Right* which may be acquired by a Bill, Check, or Note, is considered: in the second, the *Remedies* to enforce payment of them are treated of. An Appendix, of forms of declarations, &c. with annotations, and a list of the notary's fees of office, together with the statutes relative to small notes and bills, is subjoined.

That the Work may be worthy of the attention of Mercantile Men in particular, the Author has introduced into it a great deal of practical information, with which he has been favoured by several Merchants, and Notaries of experience; and in stating the cases, he has endeavoured to avoid an unnecessary detail of facts, that too frequently renders it difficult to discover the legal principle; at the same time, he has
been

been careful not to state a decision, without endeavouring to point out the reasons in support of it: circumstances which he hopes may form a favourable distinction between this Treatise and others on the same subject.

Middle Temple,
20th Feb. 1799.

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TREATISE

ON

BILLS OF EXCHANGE, &c.

PART FIRST.

OF THE RIGHT ACQUIRED BY THESE INSTRUMENTS.

CHAPTER FIRST.

OF THE HISTORY, NATURE, AND USE OF FOREIGN AND INLAND BILLS OF EXCHANGE, AND CHECKS OR DRAFTS ON BANKERS.

BILLS of EXCHANGE, whether foreign or inland, and CHECKS or DRAFTS on BANKERS, are instruments by means of which a creditor may assign to a third person, not originally party to a contract, the *legal* as well as equitable interest in a debt raised by it, so as to vest in such assignee a right of action against the original debtor. Such

PART I.
CHAP. I.

^a 1 H. B. 602.

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being

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being the general description and nature of these instruments, the operation and effect which is given to them, is obviously directly opposed to an ancient rule of law, the founders of which refused to sanction or give effect to the transfer of any possibility, right, title, or any other *chose* in action, which is defined to be a right not reduced into possession^b, to a stranger, conceiving that such alienations would tend to increase maintenance and litigation, and would afford means to powerful men to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them^c. As explanatory of one of the most peculiar properties of a bill of exchange, namely, its assignable quality, it may not be improper to take a succinct view of the progress of this common law rule, and to state how it has been received and acted upon in our courts of law and equity.

Of the doctrine relative to the assignment of choses in action.

So anxious were our ancestors to prevent the alienation of *choses*, or rights in action, that we find it enacted by the 32 H. VIII. c. 9, which, it is said, was in *affirmance of the common law*^d, that no person should buy or sell, or by any means obtain any right or title, to any manors, lands, tenements, or hereditaments, unless the person

^b Termes de la ley, tit. 45, 46.—Godbolt, 67.—Termes de la ley, tit. Chose in action.—2 Bla. Com. 442.

^c Ca. Lit. 265. a. n. 1.—232. b. n. 1. 2 Rol. Ab.

^d Plowd. 88.

contracting to sell, or his ancestors, had been in possession of the same, or of the reversion or remainder thereof, for the space of one year before the contract; and this statute was adjudged to extend to the assignment of a copyhold estate^c, and of a chattel interest, as a lease for years, out of land, whereof the grantor was not in possession^f. At what time this doctrine, which it is said had relation originally only to *landed estates*^g, was first adjudged to be equally applicable to the assignment of a mere *personal* chattel not in possession, it is not easy to decide: it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text writers, and the reports, contain numberless observations and cases on the subject. Lord Coke says^h that it is one of the maxims of the common law, that no right of action can be transferred, “because under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth.” And accordingly we find, that judgment was arrested in an action on a bond conditioned for the performance of articles of agreement, which contained a covenant that the defendant should assign certain bonds to the plaintiff for his own use, on the ground that such condition and covenant amounted to maintenanceⁱ.

^c 4 Co. 26. a.

Plowd. 77.

^e 2 Woodd. 388.^h Co. Lit. 214. a.ⁱ Aleyn, 60, et vid. 2 Rol. Ab. 45. l. 40.

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And although it was decided that the King, in respect of his prerogative, might transfer a right of action^j, yet it was afterwards ruled that his assignee had no such power^k.

This doctrine, however strictly it was attended to in our courts of law, was from the earliest times thought too absurd by our courts of equity for them to adopt, and therefore they always acted in direct contradiction to it^l: for though it is said to have been decided in the 11th James I.^m that the assignee of a covenant could not sue in a court of equity to enforce performance, because it was against law to assign a covenant, yet that seems to be an insulated case; and no other authority is to be found, where a court of equity has refused to give effect to the assignment of a *chose* in action, provided such assignment was made for a good and valuable considerationⁿ. A court of equity having it in its power to decree according to the justice of every case, there could have been no danger of maintenance being increased by its giving effect to such assignments: we therefore find a great number of cases where decrees have been made in favour of such assignees^o.

^j Dyer, 30. b.—p. 208.—ⁿ nance, B.—2 Rol. Ab. 45, 46.
² Cro. 82. Co. Lit. 232.

^k 2 Cro. 380.—Skin. 6, ^o Wils. 229.—1 Vez. 411, 412.—2 Vern. 428, 540, 595, 692.—3 Ch. Rep. 90.—Ch. Ca. 232.—3 P. W. 199.

^l Per Buller J. 4 T. R. 340.

^m 1 Rol. 376, l. 6.

ⁿ Vin. Ab. tit. Mainte.

In courts of law, the equitable interest of the assignee of a *chose* in action seems to have been recognized as far back as the middle of the last century, when we find it said by one of the judges^p, "that if an assignee of a *chose* in action has an equity, that equity should be no exile to the courts of common law." In another case also, the courts speak^q of an assignment of an apprentice, or an assignment of a bond, as things valid between the parties, and to which they must give their sanction; and an assignment of a *chose* in action has always been deemed a good consideration for a promise^r, although the debt assigned was uncertain^s. So indeed it was decided, where the obligee had assigned over a bond, and afterwards became a bankrupt, that he might nevertheless bring an action on the bond^t; and that in an action upon a bond given to the plaintiff in trust for another, the defendant may set off a debt due from the person beneficially interested, in like manner as if the action had been brought by the defendant himself^u. But though courts of law have gone the length of taking notice of assignments of *choses* in action, and of giving effect to them, yet in almost every case they have adhered

^p In Kingdom v. Jones, 33 Car. II.—Skin. 6, 7.—Sir T. Jones, 150, S. C.

^q 12 Mod. 554.

^r 1 Rol. Ab. 29.—Sid. 212.—T. Jones. 222.

^s Mouldsdale v. Birchall, 2 Bla. Rep. 820.

^t Winch v. Keeling, 1 T. R. 619.

^u Bottomley v. Brook, M. 23, G. III. C. B.—Rudge v. Birch, M. 25, G. III. B. R. cited in 1 T. R. 621, & 4 T. R. 430. sed quare vid. 7 T. R. 663.

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to the formal objection, that the action should be brought in the name of the assignor, and not in the name of the assignee; the consequence of which rule is, that the defendant may give in evidence a release, declaration, or admission of the plaintiff on the record, to defeat the action, although it is evident such plaintiff is but a mere trustee for a third person^v. It has been observed, that the substance of the rule being done away, there can be no use or convenience in preserving the shadow of it; for where a third person is permitted to acquire the interest in a thing, whether he is to bring the action in his own name or in the name of the grantor, does not seem to affect the question of maintenance^w.

Even at the earliest period of our history, the doctrine relating to the assignment of *choses in action* was found to be too great a clog on commercial intercourse; an exception was therefore soon allowed in favour of mercantile transactions. It is the observation of a learned and elegant commentator on the English laws, that in the infancy of trade, when the bulk of national wealth consisted of real property, our courts did not often condescend to regulate personalty; but, as the advantages arising from commerce were gradually felt, they were anxious to encourage it, by re-

^v 7 T. R. 663, et vid. Sel. Ca. 161.

^w Per Buller J. in *Master v. Miller*, 4 T. R. 340, et vid.

Winch. v. Keeling, 1 T. R. 621.—*Israel v. Douglas*, 1 H. B. 239.

moving the restrictions by which the transfer of interests in it was bound. On this ground, the custom of merchants, whereby a foreign bill of exchange was assignable by the payee to a third person, so as to vest in him the legal as well as equitable interest therein, was recognized and supported by our courts of justice in the fourteenth century; and the custom of merchants, rendering an inland bill transferable, was given legal effect to in the seventeenth century; and so in modern times, marine policies have been adjudged *assignable*, and to give the assignee a right of action^x; and the doctrine has been extended to respondentia bonds^y and bills of lading^z. In short, it may be observed, that our courts, subservient, as it were, to the necessity and circumstances of the times, have, in favour of commerce, adopted a less technical mode of considering *personalty* than *realty*; and, in support of commercial transactions, have established the law merchant, which is a system of equity founded on the rules of equity, and governed in all its parts by plain justice and good faith^a.

Having thus endeavoured to point out the peculiar property of bills of exchange, in respect of their being assignable, so as to give the assignee a right of action in his own name, a property which it has been already seen, few other *choses* in

Distinction between simple and special contracts; and in what respects bills, &c. partake of the nature of a specialty.

^x Master v. Miller, 4 T. R. 342.—1 T. R. 20.—Park. 449.

^z 5 T. R. 683, &c.

^a Per Buller J. 4 T. R.

^y 2 Bla. Rep. 1272.—3 T. R. 342.
R. 182.—4 T. R. 342.

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action possess, the author will proceed to state a further leading distinction between contracts evidenced by bills of exchange and other simple contracts, in respect of the former carrying with them the same internal evidence of a consideration as contracts evidenced by bonds or other specialties. The evidence which a man may have in proof of a contract is threefold: 1st, matter of *record*. 2dly, *specialty*. 3dly, *unsealed* written evidence, as notes in writing, or *oral testimony*. The first of these, the sentence of a court of judicature whose adjudications are of record, is the highest species of evidence, because this sentence cannot be impeached, or the propriety of it questioned in any action on the judgment, but only by writ of error^b; nor can there be any allegation against a record^c: secondly, specialty ranks next in point of estimation. Our ancestors entertained very high notions relative to the solemnity of sealed instruments, in respect to the deliberate mode in which they are supposed to be made and executed^d; deeds, therefore, have ever been adjudged

^b 2 H. B. 414, 418, 402.
—7 T.R. 269.—4 T.R. 432, n. a. 485.—Doug. 1, 580.
—2 H. B. 247, *acc.* Feltham v. Terry, cited in London v. Hooper. Cowp. 419, & by Buller J. 1 T.R. 387.—Moses v. Macfarland, Burr. 1007.—Hunter v. Potts, 4 T.R. 182, *contra*.

^c Gilb. on uses and trusts, 109.

^d In Plowd. 308. b. it is

said that deeds are received as a lien final to the party making them, although he received no consideration in respect of the deliberate mode in which they are supposed to be made and executed: for, 1st, the deed is *prepared and drawn*; then the *seal* is affixed; and lastly, the contracting party *delivers* it, which is the consummation of his resolution.

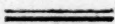
to bind the party making them, without stating PART I.
CHAP. I. or proving in an action upon them, upon what cause, or for what consideration, they are made; and any legal objection to the validity of them, which does not appear on the face of the instrument, must be shewn and proved by the defendant. But the third and last species of evidence, namely, simple unsealed written evidence, is not in general entitled to such respect, because the law supposes that contracts supported by such evidence only, may have been made inadvertently, and without reflection^e; and therefore will not in general enforce performance of such contracts, unless the person attempting to derive an interest under them, can prove that they were made for a good and valuable consideration. It is otherwise, however, in the case of a bill of exchange^f, it being, as will be seen hereafter, scarcely ever necessary that the plaintiff should prove that he gave a consideration for it; and in no case open for the defendant to prove that he received no consideration, unless in an action brought against him by the person with whom he was immediately concerned in the negotiation of the instrument^g. In this respect, therefore, a bill of exchange, although it is not a specialty^h, yet it possesses the same privileges as a bond, or other specialty, particularly when it is in the hands of a third person. It is

^e Fonbl. 329, 333.^f 1 Wils. 189.^g 1 Bla. Rep. 445, et post.^h 3 Salk. 70.

not,

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CHAP. I.

not, however, owing to the form of a bill of exchange, nor to the circumstance of its being in writing, that the law gives it the effect of a specialty, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of this species of security : for notwithstanding a contract is in writing, it is essential to the validity of it, that it should in all cases be founded on a sufficient consideration, unless the writing, from its being of the highest solemnity, imports a consideration, or unless it be negotiable at law, and the interests of third persons are involved in its efficacy.



Two of the most peculiar properties of bills of exchange, namely, their assignable quality, and the internal evidence which they contain of a good consideration, having been pointed out, it may be proper to enquire into the history, general nature, and use of these instruments, beginning with foreign bills of exchange.

History,
nature, and
use of fo-
reign bills of
exchange.

It seems extremely doubtful at what period, or by whom, *foreign bills of exchange* were first invented, as almost all the elementary writers on the subject differ in their opinions. It is said by Pothierⁱ, that there is no vestige among the Romans of bills of exchange, or of any contract of

ⁱ Traité de Droit Civil, tit. Traité du contrat de change, pl. 6.

exchange; for though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to pay it to his son at that place, and that friend, in order to perform Cicero's direction, wrote to one of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son, yet it is observed that this mode amounted to nothing more than a mere order, or mandate, and was not that species of pecuniary negotiation which is carried on through the medium of a bill of exchange; nor does it appear that the commerce of the Romans was carried on by means of this instrument, for we find by one of their laws^j, that a person lending money to a merchant who navigated the seas, was under the necessity of sending one of his slaves to receive of his debtor the sum lent, when the debtor arrived at his destined port, which would certainly have been unnecessary, if commerce through the medium of bills of exchange had been in use with them. Most of our modern writers have asserted (probably resting on the authority of Montesquieu^k), that these instruments were invented and brought into general use by the Jews and Lombards when banished for their usury, in order, with the secrecy necessary to prevent confiscation, to draw their effects out of France and England, to those countries in which they had chosen, or been compelled to reside; but Mr. Justice Blackstone says^l,

^j *De nautico sænere.*

^k Esp. L. 21, c. 16.

^l 2 Bla. Com. 467.

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CHAP. I.

this opinion is erroneous, because the Jews were banished out of Guienne in the year 1287, and out of England in the year 1290^m; and in the year 1236 the use of paper credit was introduced into the Mogul empire in Chinaⁿ. Other authors have attributed the invention to the Florentines, when, being driven out of their country by the faction of the Gebelins, they established themselves at Lyons and other towns^o. On the whole, however, there is no certainty on the subject, though it seems clear, foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period, and an inference drawn from the statute 5 Rich. II. st. 1. 2.^p warrants the conclusion, that foreign bills were introduced into this country previous to the year 1381. The mode of transmitting money from one country to another by means of these instruments, being once discovered, the advantages derived from it soon induced merchants universally to adopt it; and from thence it very early grew into a custom, which seems to have been judicially sanctioned in this country at a very early period of our history, though no earlier decision relative to the custom can be found, than that in 10 Jas. I.^q where it was adjudged, that an acceptance raised an *assumpsit* in law, for the breach of which an action

ⁿ 2 Carte. Hist. Engl. 203, 206.

^o The only authority in support of this assertion is the 4 Mod. Un. Hist. 499.

^p Poth. pl. 7.

^q Claxton v. Swift, 2 Show.

485.

^r Oaste v. Taylor, Cro. Jac. 306.—1 Rol. Ab. 6.

on the case would lay. However, as our courts <sup>PART I.
CHAP. I.</sup> did not conceive it necessary to the encouragement of commerce, that this exception to the rule relative to *choses* in action, should be carried any further than to foreign bills drawn merely for the purposes of trade, we find that they would at first only give effect to bills made between merchant strangers and English merchants¹: however, it was soon extended to all traders and negotiators; and, finally, to all persons, whether traders or not².

A foreign bill of exchange is an open letter of request from one person to another, desiring, or in other words, authorizing that person to pay a sum of money therein mentioned to a third person³, and is consequently an assignment to the payee, of a debt due from the drawee to the drawer⁴. The progress of mankind, from barter of commodities to the invention of money, in the common transactions of life, must have been very rapid; for we find Abraham giving "400 shekels of silver *current money with the merchant*," for the field of Machpelah⁵. And when the necessities of transmitting money from one country to another, arising from foreign commerce, were felt, it is obvious that even a metallic representative of value was subject to inconveniencies, and was liable to be frequently lost, either by robbery or other acci-

¹ 2 Cro. 306, 7.

² Per Treby, Ch. J. 2 Lutw.

1585.—2 Vent. 295, 310.—
Comb. 45, 152.

³ 2 Bla. Com. 466.—1 H.
B. 586.

⁴ 1 H. B. 602, per Eyre, C. J.
Gen. c. 23. v. 16.

dent :

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dent: bills of exchange were therefore invented, by means of which a man may transmit the value of money from the most distant part of the world without any risk whatever. Such then is the use of bills of exchange, added to which, it has been observed, that they being the signs of valuable property, equivalent to specie, and serving the purposes of cash^w, enlarge the capital stock of wealth in circulation, and thereby facilitate and increase the trade and commerce of the country^x.

History,
nature, and
use of in-
land bills of
exchange.

INLAND BILLS OF EXCHANGE, which are so called because they are drawn and payable in this country, according to Lord C. J. Holt's opinion, did not originate at a much earlier period than the reign of Charles the Second^y. They were at first, like foreign bills, more restricted in their operation than they are at present; for it was deemed essential to their validity, that a special custom for the drawing and accepting them should exist between the towns in which the drawer and acceptor lived; or, if they lived in the same town, that such a custom should exist therein^z. The custom was likewise at first only given effect to when the parties to the instrument were merchants, though afterwards extended, as in the

^w Doug. 633.

^x L. C. Baron Eyre, 1 H. B. 618, et vid. 361, 605, 606.

^y 6 Mod. 29, et vid. Hardr.

485 (20 Car. II.) 1 & 2. Jac. II. 3 Mod. 86.—Marins 2.

^z 6 Mod. 29.—Ld. Raym.

175, 1542.—Lutw. 279.—4 Mod. 242.

case of foreign bills, to all persons, whether traders or not so^a. And even after the general custom had been established, and it had been adjudged that all persons having capacity to contract, might make them, a distinction was taken with respect to form between bills made payable to order and bills made payable to bearer; for it was once thought, that no action could be maintained on a bill payable to the order of a certain person, by that person himself, on the ground that he had only an authority to indorse; and those of the latter description were at first thought not to be negotiable in any case. These distinctions, however, have long been adjudged to be without foundation; and on the whole, the observation of the learned and elegant commentator on the English law, may be adopted, namely, that although formerly foreign bills of exchange were more favourably regarded in the eye of the law than inland, as being thought of more public concern in the advancement of trade and commerce, yet now, by various judicial decisions, and by two statutes enacted on the subject, the one the 9th and 10th W. III. c. 17, the other 3d and 4th Ann, c. 9, inland bills stand nearly on the same footing as foreign ones; and what was the law and custom of merchants with regard to the one, and taken notice of merely as such, is now by those statutes enacted with regard to the other.

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^a Lutw. 1585.—Carth. 82, S. C.

PART I.
CHAP. I.

History,
nature, and
use of *checks*
or *drafts* on
bankers.

BANKERS' CHECKS, or drafts on bankers, seem to have been sanctioned and recognized by our courts of justice, as instruments, previous to the statute of Ann. Though in point of form, the same as bills of exchange, they differ from them in this respect, that they are uniformly made payable to bearer; and from their daily and immediate use, the legislature has also considered them in a more favourable light, in the exemption of them in certain cases from stamp-duties; for, as will be seen hereafter, no draft or order for the payment of money to the bearer on demand, bearing date on or before the day on which the same is issued, and at the place from which the same is drawn and issued, and drawn on a *banker* acting as such within *ten* miles of the place where such draft or order was actually made, is subject to any duty^b. It was once thought that these instruments were not generally negotiable, but were merely so within the bills of mortality^c; but it is now settled that they are as negotiable as bills of exchange, though, strictly speaking, they are not due before payment is demanded, in which respect they differ from bills of exchange, or promissory notes made payable at a particular day^d: they are considered as cash, when given in payment^e; and they may be declared on as bills of

^b See 31 G. III. c. 25.

^c Burr. 1517.

^d 7 T. R. 423.

^e Id *ibid*.

exchange^f. It is said, however, though it does not appear on what foundation, that checks are not protestable^g.

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CHAP. I.

It may be collected from the preceding observations, that there exists a general resemblance between bills and checks, the history, nature, and use of which have been the subject of this chapter; it will therefore be unnecessary in the following pages of this Treatise, to make any distinct observations on them, unless where the law relative to bills, is inapplicable to checks, or *vice versa*.

Resem-
blance be-
tween bills
and checks.

There being, as has been previously observed, no resemblance whatever between promissory notes, cash notes, and bank notes, and bills and checks, in their *original formation*, and the similitude not beginning till they have been indorsed^h, the consideration of them is postponed to the last chapter of this part of the Treatise.—As, however, the act of indorsing a promissory note, places the person making it in the same situation in respect of liability, as that of the drawer of a bill, and imposes on the maker of a note the same obligation as that to which the acceptor of a bill is subjectⁱ, such cases as have been decided on promissory and cash notes, are of course analogous to bills of exchange, and will in the first part of this Treatise be so considered.

^f 7 T. R. 423.

^h Per Ld. Mansfield, Burr.

^g Grant v. Vaughan, Burr. 676.
1519.

ⁱ Id *ibid*.

CHAPTER SECOND.

OF THE PARTIES TO A BILL OF EXCHANGE, OR
CHECK.

IT is essential to the validity of every contract, that there be proper parties to it, and that those parties have capacity to contract. The parties to a contract are generally only two, namely, the person binding himself to perform some act, and the person in whose favour that act is to be performed; but in the case of bills of exchange and checks, on account of the assignable quality of each instrument, there may be, and usually are, several more parties. The capacity of the contracting parties, or, in other words, who may be parties to the transaction, will be considered in the first part of this chapter. The number of the parties, and the mode by which they may become such, will be the subject matter of enquiry in the second part.

Sect. 1. Of
the capacity
of the con-
tracting par-
ties.

It appears^a, that in France ecclesiastics were prohibited from being parties to a bill of exchange, or to carry on commerce in any way, on the principle that such transactions were repugnant to the sanctity of their profession. But in this country no such restraint is imposed on the clergy, and, though by the statute 21 Hen. VIII. c. 13, s. 5,

^a Poth. Traité de change, pl. 27.

clergy-

clergymen are prohibited, under severe penalties, from trading or farming, yet the act of being a party to a bill would not constitute a trading within the statute; and if it did, as the act is merely prohibitory^b, the bill itself would not be invalid.

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It was once thought, that as the only reason why bills of exchange were suffered to be transferred from one person to another, and treated as specialties, was because they were the means of increasing commerce, and facilitating the ends of it, no person who was not a merchant, or engaged in some trade, could be party to a bill^c. It has, however, been long settled, that all persons having capacity and understanding to contract in general, may be concerned in the negotiation of these instruments^d. Corporations may, by the intervention of their agents, be parties to a bill^e: a restraint is, however, imposed by the legislature on the mode in which they may draw bills, it being enacted^f that no corporation, or partnership exceeding the number of six persons (except the governor and company of the Bank of England), shall borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof.

^b Atk. 196.—Cowp. 745. 125.—12 Mod. 36, 380.—

^c Lutw. 891, 1585. Salk. 125.

^d Carth. 282.—2 Vent. ^e 1 Atk. 181.—2 Burr. 1216.

292.—Comb. 152.—1 Show. ^f 6 Ann. c. 22, s. 9, and 15 G. II. c. 13, s. 13.

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With respect to the competency of the contracting parties in general, it may be observed that the law has wisely taken care of the interests of those who either have not judgment to contract, as in the case of infants; or, when they have contracted, cannot in law have a fund or property to enable them to perform the contract, as in the case of *feme-coverts*, and therefore it has in general rendered the contracts of infants voidable, and those of married women absolutely void. These privileges and protections, it has been elegantly said, are given as shields, and not as swords, and therefore infants may contract for necessities^a; for they would otherwise be in worse circumstances than persons of full age^b. It may however be doubtful, whether a bill of exchange given by an infant for necessities, would have the usual operation of that instrument, against him; for although it seems to have been once admitted that it would^c, and it has been decided that a single bond, or bond without a penalty, will bind an infant, when given for necessities^d; yet it may be observed, that if a bill of exchange, considered as a contract^e, were to have an obligatory force on an infant, it might, owing to its assignable quality, when in the hands of a third person not privy to the original contract, preclude the infant from

^a Co. Lit. 172. a.—Burr. 1801.

^b 2 Atkin. 35.

^c Carth. 160.—Ash. Ent. 273.

^d March. 145.—1 Rol. Ab. 729, pl. 8.—1 Lev. 86.

^e Cases in L. and E. 185.

disputing the value of the necessities, and would have the same operation as the statement of an account, which it has been adjudged will not bind him¹. As, however, the contract of an infant is only voidable, and not absolutely void, he may by a promise to pay the bill, made after he attains twenty-one, render it as operative against him as if he had been of age at the time when it was made; and such promise need not be express, but may be inferred from acts necessarily affording an inference that it was made^m.

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Married women likewise may, according to several modern decisions, contract so as to bind themselves, provided they live apart from their husbands, and have a permanent separate maintenance secured to them by deedⁿ. On this point, however, there is some doubt, as the authority of the decisions tending to establish it have been questioned of late by high legal authority^o. It is here proper to observe, that although a bill is drawn, indorsed, or accepted, by a person incapable of binding himself, it will nevertheless be valid against all other persons who are competent parties to the instrument^p.

¹ 1 T. R. 40.—Sel. Ca. 17. R. 5.—4 T. R. 766.—5 T. R.
^m Sel. Ca. 166, 201.—1 T. 679.—Burr. 1776.
 R. 648.
ⁿ 2 Bla. Rep. 1079, 1195.—^o 4 T. R. 361, 766.—5 T.
 Ringstead v. Lady Lanesbo- R. 679.—6 T. R. 604.—Esp.
 rough.—Cooke's Bkpt. Laws, Ca. N. P. 6.
^p Poth. pl. 29.—2 Atkin.
 32.—1 H. B. 334, 350.—1 T. 181, 2.

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Se^ct. 2. Of
the number
of the par-
ties, and
mode by
which they
may become
such*.

Bills of exchange differ, as has been observed, from most other contracts, in the circumstance of there being frequently more than two parties to them : a bill has, indeed, previously to its being transferred, generally three parties, namely, the person making it, who is called the *drawer* ; the person to whom it is directed, who previous to acceptance is called the *drawee*, and subsequent to it, is entitled the *acceptor* ; and the person in whose favour it is made, who is called the *payee*. It is not, however, necessary that there should be three parties to a bill ; there are indeed sometimes only two, as where a person draws a bill on another person, payable to his own order ; and in fact, a bill will be valid where there is only one party to it, for a man may draw on himself^a, payable to his own order ; but in such case it is said^r that the instrument is more in the nature of a promissory note than a bill of exchange ; however, it is always declared on as a bill of exchange, from whence it may be inferred, that its legal operation is the same. It is by transfer from one person to another, of a bill of exchange, when it is negotiable, that the parties may become numerous, in which case, if the transfer is by indorsement, the person making it is called the *indorser* ; the person in whose favour the transfer is made, the in-

* Poth. chap. 2, s. 1. per 163. — Burr. 1677. — Fort. tot. 281. — Marius, 3.

^a Carth. 509. — 1 Show. ^r Bayl. 26.

dorsee ;

dorsee; and in all cases, the person in possession of the bill is called the *holder*. PART I.
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The drawer, acceptor, indorser, and holder, are the principal and immediate parties to the instrument; but besides them, a person may become a party to it in a collateral way*, as where the drawer refuses to accept, any third party, after protest for non-acceptance, may accept for the honour of the bill, or of the drawer, or of any particular indorser, in which case the acceptance is called an acceptance *supra protest*, and the person making it is styled the acceptor for the honour of the person on whose account he comes forward; and he acquires certain rights, and subjects himself to the same obligations, as if the bill had been directed to him. A person may likewise become party to the instrument by *paying it supra protest*, either for the honour of the drawer or indorsers. The rights and obligations attached to this collateral mode of becoming party to a bill, will be spoken of hereafter.

With respect to the mode of becoming party to any one of these instruments, it is a general rule, that no person can become a party to a bill, unless his name appears on some part of it; but, however, a man may become drawer, indorser, or acceptor, not only by his own immediate act, but also by the act of his agent, or by that of his partner.

* Poth. pl. 25, 26.

* Per Buller J. in *Fenn v. Harrison*, 3 T. R. 760.

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It is a general rule of law, that wherever a man has a power as owner to do a thing, he may, consequently, as incident to his right, do it by attorney or *agent*^u. Hence it is clear, that a person may draw, accept, and indorse a bill by his agent as well as by himself^v. In these cases, he is said to draw, accept, or indorse by *procuratio*^w. As the doing either of these acts is the execution of a mere *ministerial* office, infants, *feme-coverts*, persons attainted, outlawed, excommunicated, aliens, and others incapable of contracting in their own right, so as to bind themselves, may be agents for these purposes^x. With respect to the manner of their appointment, it is asserted^y that there ought to be a formal power of attorney; but this is by no means necessary; for the authority which an agent has to draw, indorse, and accept bills, in the name of his principal, may be, and indeed most usually is, by parol^z. With respect to the extent of the agent's power, it is proper to observe, that if a person is appointed a *general* agent, as in the case of a factor for a merchant residing abroad, the principal is bound by all his acts; but an agent, constituted so for a particular purpose, and under a *limited* and *circumscribed* power, cannot bind the principal by

^u 9 Co. 75. b.^v Molloy, b. 2, c. 10, s. 27.—Lord Raym. 930.—6 Mod. 36.—12 Mod. 346, 564, et vid. 3 and 4 Ann, c. 9, §. 1.^w Beawes, pl. 83.^x Co. Lit. 52. a.^y Beawes, pl. 86.—Marius, 2d ed. p. 104.^z 12 Mod. 564.—7 T. R. 209.

any act whereby he exceeds his authority; for if the law were otherwise, a man might bind another against his consent^a.

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Therefore, where *A.* desired *B.* to get a bill discounted for him, but declared that he would not indorse, it was decided by the majority of the court, that no representation of *B.* could bind *A.* as an indorser, though it was insisted that what *B.* had done was within the scope of his employment, which was to raise money on the bill. It appearing, however, on a second trial, that *A.* did not declare that he would not indorse, it was adjudged that as he had authorized *B.* to get the bill discounted, without restraining his authority as to the mode of doing it, he was bound by his acts^b. With respect to what is, and what is not, a *general* authority, it has been decided, that a person signing his name on a blank stamped piece of paper, and, delivering it to *I. S.* authorizes *I. S.* to insert any sum which the amount of the stamp will warrant^c; and it has also been adjudged^d, that a letter of attorney given by an executor to *A. B.* enabling him to transact the affairs of the testator in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveys to *A. B.* a sufficient authority to

^a Per Buller J. in *Fenn v. 177, et vid. Collis v. Emet, Harrison, 3 T. R. 757, et vid. H. B. 313.—Russel v. Lang-*
Esp. Ca. N. P. 111, acc.—staff, Doug. 514.

Nixon v. Bromham, Sel. Ca.

^c 1 H. B. 313.—Doug. 514.

¹⁷ *contra.*

^d 2 H. B. 618, *sed quare,*

^b 3 T. R. 757.—4 T. R. 6 T. R. 591, et 1 H. B. 155.

accept

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accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, and thereby to make the executor personally liable, on the ground that an authority of this nature necessarily includes all intermediate powers, that is to say, all the means necessary to be used in order to effect the accomplishment of the object of the principal framer, namely, the paying, satisfying and discharging the testator's debts. An authority may not only be express, but it may be *implied*, and inferred from prior conduct of the principal; it is therefore said^e, that if an agent has upon a former occasion, in the principal's absence, usually accepted his bills, and the principal on his return approved thereof, it would bind him in a similar situation on a second absence from home. It has also been decided^f, that a *subsequent assent* will make the act of an agent binding on the principal. It appearing from the above, that the principal will be bound by every act of his general agent, although he exceeds his authority, it is therefore well observed^g, that it is incumbent on the employer to take particular care whom he authorizes, as otherwise it may be of the most fatal consequence to him. And as it appears^h that a master who has empowered a servant to draw bills of exchange in

^e Beawes, pl. 86.—Mar.
2d ed. 105.

^f Ld. Raym. 930.—Comb.
450, acc. 3 T.R. 757.—2 H.B.
618, *semb. contra.*

^g Beawes, pl. 84.

^h 12 Mod. 346.—Beawes,
pl. 231.

his name, is bound by acts done subsequent to leaving his service, unless notice is given, it is incumbent on every employer to give notice of such fact to all his correspondents individually; notice in the Gazette not being sufficient, unless it is brought home to the knowledge of the person insisting on the want of it'. As the authority of an agent is a power uncoupled with an interest, he cannot delegate it so as to enable another person in the place of himself to act for his principal^j: if, however, an express authority is given him for that purpose, he may exercise it^k. In the execution of the authority entrusted to him, the agent must, as in doing all other acts, do it in the name and on the account of his principal, or otherwise it will not bind the principal^l; and in such case the agent would be personally liable^m.

With respect to a person becoming party to a bill by the act of his *co-partner*, it is observable, that although in general one joint tenant, or person jointly interested with another in real or personal property, is not capable by himself to do any act which may tend to injure the other's interestⁿ, yet by the custom of merchants, where there are two joint traders, and one accepts for himself

^j Peake, 42, 154.

^k 9 Co. 75.—Rol. Ab. 330.

^l Bunb. 166.

^m 9 Co. 75.—1 Stra. 705.—
Com. Di. tit. Attorney, C.
14.—Beawes, pl. 83, 4, 5, 6,
7.—6 T. R. 176, 7.

ⁿ Stra. 955.—1 T. R. 181,
acc.—Rep. T. H. 3, *contra*.

^o 1 Lev. 234.—2 Co. 67.
—Bridgm. 129.—Bac. Ab.
tit. Joint Tenant, H. 3.

and

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and partner a bill drawn on both, it binds both, if it concerns the trade. And this custom being extremely convenient to persons in trade, our courts have long given their sanction to it^o. It is said^p, that the act of one partner will not bind the other, if it concerns him only in a distinct interest; but according to other authorities, it should seem that it is immaterial whether the bill is drawn or accepted on account of the partnership concern or not, provided the holder is not conusant of its being the act of one partner for his sole benefit^q; and that one partner may pledge the credit of his co-partner to any amount by any act in the way of merchandize, done in the name of the firm, or of all the parties^r. One partner, however, cannot bind another by deed, without an express authority so to do^s. Wherever the law is silent as to the extent of this custom, it should seem that evidence of the usage and custom of merchants is admissible, but not otherwise^t; and therefore, where two persons who were not partners drew a bill on *A. B.* payable to their order, and only one of them indorsed it, in an action at the suit of an indorsee against *A. B.* as acceptor, Lord Mansfield admitted evidence to prove, that by the uni-

^o 1 Salk. 125.—*Ld. Raym.* 175. *S. C.* et *vid.* *Lord Raym.* 1484.—1 Salk. 292.—*Sty.* 370. *arg.*—7 *T.R.* 207.—12 *Mod.* 345.—2 *Vern.* 277, 292.—*Bac. Ab.* tit, *Merchant, C.*

^p 1 Salk. 125.

^q *Peake*, 80.—2 *Vern.* 277, 292.—*Esp.* 524.

^r *Id* *ibid.*

^s 4 *T. R.* 313.—7 *T. R.* 207.

^t *Burr.* 1216, 1221.—1 *Bla. Rep.* 295.

versal usage and understanding of all the merchants and bankers in London, the indorsement was bad, because not signed by both the payees; and accordingly the defendant had a verdict; notwithstanding it was insisted that the validity of the indorsement was a question of law, and although the court of King's Bench had previously declared its opinion in the same cause, that when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself; and that if they appear on the bill as partners, it would be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so; and in short, that persons, by making a bill payable to their order, render themselves partners as to that transaction". If a factor of an incorporate company draws a bill on such company, and one member accepts it, the acceptance will not bind the company, because it is a private act of the party, and not a public act of the company. And on the same principle, if several persons, each in his individual capacity, employ one factor, and he draws a bill on all of them, and one accepts it, the acceptance will not bind the rest". Sometimes an *express* authority is given by several partners to one, to act for all

^u Carwick v. Vickery, Doug. 2d ed. 16.—Beawes, pl. 228.
653. —Molloy, b. 2. c. 10, s. 18.
^v Bul. N. P. 279.—Mar.

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of them, in which case the person authorized acts as agent, as well as partner, and his power and authority being express, he must be guided by it. An authority given to one partner to receive all debts owing to, and to pay those due from, a partnership on its dissolution, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution^w. From this liability of partners to answer for the acts of one another, it is necessary that after the dissolution of their connection they should, in order to avoid the consequences of any one of the partners making, indorsing, or accepting a bill in their names, give notice in the Gazette, of the dissolution of partnership. And even this *notice*, as has been before observed, is not sufficient, unless it be brought home to the knowledge of the holder of the bill; and they should therefore give notice to their individual correspondents^x. It is here proper to remark, that whenever a person draws, accepts, or indorses a bill for himself and partner, he should always express that he does so “for himself and partner,” or should do each in the name of the firm, as otherwise, it may be doubtful whether it would bind the partner^y.

^w 1 H. B. 155.

^x Peak, 42, 154.—Cowp. 449.

^y 1 Salk. 126.—Ld. Raym. 175.—Carwick v. Vickery, Doug. 653.—Ld. Raym. 1484.

CHAPTER THIRD.

OF THE FORM AND REQUISITES OF BILLS
AND CHECKS—CONSIDERATION FOR WHICH,
MADE OR TRANSFERRED—CONSTRUCTION
OF THEM—CONSEQUENCE OF ALTERATION
IN THEM—AND OF THE DRAWER'S OBLI-
GATION.

IN the formation of a bill of exchange, or check, although each must be in writing^a, there is in general no particular form, or set of words, necessary to be adopted, any more than in the case of a bond or other deed^b, and indeed our courts considering the general utility of these instruments, and how much they tend to the extension of credit, and consequent advancement of trade and commerce, have uniformly gone further in giving effect to them as instruments, than they have where a question has arisen on the formation of a deed^c. It is however advisable, and in certain cases necessary, to draw bills and checks in the forms which will be presently given. And although these instruments are thus favoured, with

The form
and requi-
sites of bills
and checks.

^a Rep. T. Hardw. 2.

^b Com. Dig. tit. Obliga-
tion, B. 1, 2.—Bac. Ab. tit.
Obligation, B.

^c 10 Mod. 287.—8 Mod.

364.—3 Wils. 213.—2 Ld.
Raym. 1397.—Stra. 629,
786.—Rast. 338.—Esp. Ca.
Ni. Pri. 129.

respect

respect to form, they must possess certain essential qualities, without which they will not operate as instruments, and will only be considered as special agreements, or, in other words, mere evidences of contracts, and consequently will not carry with them any internal evidence of a consideration, or be negotiable^d. These qualities are, first, that the instrument be made payable at all events, not dependant on any particular event or contingency^e; and, secondly, that it be for the payment of money only^f, and not for the payment of money and performance of some other act^g.

The reason on which it has been adjudged that payment of negotiable bills of exchange must not be contingent, is founded on the principle, that it would perplex commercial transactions, if paper securities of this kind were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation, were obliged to enquire when these uncertain events would probably be reduced to a certainty^h. If therefore an instrument purporting to be a bill of exchange, or check, is not payable at all events, as if, for in-

^d 3 Wils. 213.—2 Bla. Rep. 1072.—5 T. R. 485.—

7 T. R. 241.—1 H. B. 239.

^e 3 Wils. 213.—4 Mod. 242.—2 Stra. 1151.—Comb. 227.—Bul. Ni. Pri. 272.

^f Bul. Ni. Pri. 272.

^g Stra. 1271.—Bul. Ni. Pri. 272.

^h Per Kenyon, Ch. J. in *Carlos v. Fancourt*, 5 T. R. 485, et vid. 3 Wils. 213.—1 Burr. 325.

stance, it is made payable provided a certain *event* does or does not take place, which being *contingent*, may never happenⁱ; or, if it purports to be payable out of a *particular fund* which may not be productive^j, it will not be negotiable in the first instance, nor can it become so by any subsequent circumstance^k. It is said indeed^l, that it cannot be considered as a bill in any case: it appears, however, that an instrument of this nature may be considered and declared on as a bill between the original parties to it^m. There is an exception to this rule in the case of a bill payable on a contingent event, where that event is of public notoriety, where there is a moral certainty of its taking place, and where it respects tradeⁿ; as, if it be payable "two months after a certain ship be paid off^o;" or be payable "on the receipt of the payee's wages due to him from a certain ship^p". And in all cases, if the event on which the instrument is to become payable must inevitably happen some time or other, it is of no

ⁱ Skin. 398, pl. 32.—Ld. Raym. 1362, 1396.—Stra. 1151.—Comb. 227.—4 Mod. 242.—5 T. R. 482.—7 T. R. 242.

^j Fort. 281.—10 Mod. 294.—Ld. Raym. 1362, 1563.—3 Wils. 207.—Bl. Rep. 782.—Stra. 592, 1211.—8 Mod. 265.—4 T. R. 343.—1 Vez. jun. 280.

^k Kingston v. Long. B. R. M. 25 G. III. Bayl. 8, *acc.*

Lewis v. Orde, 1 Gilb. Evid. by Loft, 179, *semb. contra.*

^l Bayl. 8.

^m Per Kenyon, Ch. J. in Alves v. Hodgson, 7 T. R. 243.

ⁿ Stra. 24.—1 Wils. 262.—Bul. Ni. Pri. 272.—Lewis v. Orde, 1 Gilb. Evid. by Loft, 179.

^o Same cases.

^p Same cases.

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consequence how long the payment may be in suspense; and therefore, if a bill is drawn payable six weeks after the death of the maker's father^q, or payable to an infant when he shall come of age, specifying the day when that event is to happen^r, it will be valid, and negotiable. The mention of any particular fund in a bill of exchange, will not vitiate it, if it is inserted only by way of direction to the drawee how to reimburse himself; and therefore a bill, requesting the drawee one month after date to pay the plaintiff or his order, a certain sum of money, "as my quarterly half-pay, to be due from the 24th June to the 27th September next, by advance," was decided to be a valid bill^s; nor will a bill be vitiated by the insertion of words pointing out the consideration of the acceptance; as for instance, "value received out of the premises in Rosemary-lane^t;" or "being a portion of a value as under, deposited in security for the payment hereof^u." A note also whereby the maker promised to pay "to *A. B.* 8*l.* so much being to be due from me to *C. D.* my landlady, at Lady-day next, who is indebted in that sum to *A. B.*" was on the same principle adjudged not to be conditional^v.

The principle on which it has been decided that a bill must be for the *payment of money*

^q Stra. 1217.

^r Burr. 226.

^s Stra. 762.—Lord Raym. 1481.—1 Barnard, 12.

^t Lord Raym. 1545.

^u 7 T. R. 733.

^v Sel. Ca. 39.

only, and not for the payment of money and the performance of some other act^w, is the same as that on which the preceding rule is founded^{*}.

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Besides these principal qualities which bills of exchange must possess, there are certain other matters proper to be attended to in the formation of them : these are, *1st*, that in certain cases the instrument be properly stamped. *2dly*, that it be properly dated. *3dly*, that the time of payment be clearly expressed. *4thly*, that it contain an order, or at least a request, to pay. *5thly*, that in the case of a foreign bill drawn in sets, each set contain a proviso that it shall only be payable in case the others are not paid. *6thly*, that it be clearly expressed to whom the bill is payable. *7thly*, that where the instrument is intended to be negotiated, there be words inserted, giving the power of transfer. *8thly*, that the money to be paid be distinctly and intelligibly expressed, and in certain cases, that it be above a certain amount. *9thly*, that in certain cases, value received be inserted. *10thly*, that under particular circumstances, a bill state whether it is to be paid with or without further advice. *11thly*, that the drawer's name be clearly signed. *12thly*, that the bill be properly addressed to the drawee. And *lastly*, that where the bill is to be paid at a certain place, that place be properly described. The better mode of considering

^w Stra. 1271.

^{*} Bul. Ni. Pri. 272.

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each of these matters will be, by presenting the reader with the usual forms of a foreign and inland bill of exchange, and of a check, and then considering the various parts of each in their natural order.

FORM OF A FOREIGN BILL.

²London, ³1st January, 1798. Exchange for ⁴10,000 Livres Tournoises.
⁵At ⁶two usances (or "at sight," or "after date") pay
¹Stamp. ⁷this my first Bill of Exchange (second and third of the same tenor and date not
⁹paid) to Messrs. ———, or order (¹⁰"or bearer") ¹¹Ten Thousand Livres Tournoises,
¹²value received of them, and place the same to account, as per advice from
¹³To Mr. ———, in ¹⁴Paris, } ¹⁵JAMES OATLAND.
¹⁶payable at ———. }

FORM OF AN INLAND BILL.

⁴£. 100. London, ²1st ³January, 1798.
¹Stamp. ⁵At sight (or "on demand," "at ⁶day after sight,"
¹¹"at ¹²after date") pay to Mr. ———, or order (¹⁰"or bearer") ¹⁵One Hun-
¹⁶dred Pounds, for value received. SAMUEL SKINNER.
¹⁷To Mr. ———, Merchant in }
¹⁸Bristol, payable at ———. }

FORM OF A BILL UNDER FIVE POUNDS:

As directed by Stat. 19. Geo. III. c. 30. Schedule No. 2.

[Here insert the place, day, month, and year, when and where made.]

Twenty-one days after date pay to A. B. of ———; or his order, the sum of ———,
 value received by

To E. F. of ———, }
 Witness G. H. ———. }

C. D.

FORM OF A CHECK.

⁽²⁾London, ⁽³⁻⁵⁾5th October, 1798.
⁽¹⁶⁻¹⁷⁾Mr. Conits,
⁽⁶⁾Pay ⁽⁹⁾A. B. or ⁽¹⁰⁾Bearer, ⁽¹¹⁾Twenty Pounds.
⁽¹⁵⁾J. K.
⁽⁴⁾£. 20 0 0

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(1)—Previously to the statute of the 22d Geo. III. c. 33, there were no *stamps* imposed on mercantile instruments of a negotiable nature; and bills of exchange and checks were in all cases made on plain unstamped paper, and, indeed, were expressly exempted from any stamp duty by the 5th W. & M. c. 21, s. 5; but by the statute 22 Geo. III. c. 33, certain duties were imposed in almost all cases upon these instruments. This, and a subsequent statute, were repealed by the 31st Geo. III. c. 25, whereby certain duties are imposed, which are increased by the 37th Geo. III. c. 90.—On these two latter statutes, the law relative to stamps on bills and checks at present stands.

With respect to *foreign* bills of exchange, it is clear^y that the legislature did not mean to extend the stamp duties imposed by these acts to such foreign bills as are made abroad, but only to those made in this country; and, it appears from the 3d section of both the stamp acts, that unless a foreign bill is drawn in sets, it will be subject to the same stamp as an inland bill.

The duty imposed on *foreign* bills drawn in sets, is on each bill of the set as follows:

				s.	d.
Where the sum payable does not exceed £ 100, the duty of	-			0	8
Ditto ditto does exceed 100, but does not exceed 200l.	1	0			
Ditto ditto ditto 200, - - -	1	4			

^y Bayl. 15.—7 T. R. 601.

With

With respect to *inland* bills and *checks*, the PART I.
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duties are as follows :

First, On bills, drafts, or orders for payment of money on DEMAND :

				s. d.	
For any sum from	40s.	to	£5 5s.	a duty of	- - 0 4
	£5 5	to	30	ditto	- - 0 8
	30	to	50	ditto	- - 1 0
	50	to	100	ditto	- - 1 4
	100	to	200	ditto	- - 2 0
	200	and upwards		ditto	- - 2 8

A bill payable *at sight*, is not to be considered as a bill payable *on demand* within this act². By the 4th section of the 31st Geo. III. c. 25, it is provided, that no draft or order for the payment of money to the *bearer on demand*, bearing date on or before the day on which the same shall be issued, and at the place from which the same shall be drawn and issued, and drawn upon *any banker* acting as such within *ten miles* of the place where such draft or order was actually made, shall be subject to any duty.

Secondly, On bills, drafts, or orders, NOT payable on demand :

				Total Duty.	
				s. d.	
The amount whereof is	£20	to	£30	a duty of	- - 0 8
	30	to	50	ditto	- - 1 0
	50	to	100	ditto	- - 1 4
	100	to	200	ditto	- - 2 0
	200	and upwards		ditto	- - 2 8

These several duties are, by the 2d section of the 31st of G. III. c. 25, directed to be paid by

² *I'Anson v. Thomas*, B.R. n. 6, vid. post.
T. 24 Geo. III.—Bayl. 24,

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the drawer of the bill or check, who, as well as the person accepting or paying the same, without its having been previously stamped, is subject to a penalty of 20l. under the 10th section of the act. It is likewise provided by the 19th section, that unless the paper on which these instruments are written, is stamped previously to their being made, they shall not be received in evidence in any court of justice whatever. And the commissioners were forbid to stamp any bill after it was made. If, however, they exceed their authority, and do stamp the instrument after made, no defence can be made to an action founded on the instrument, on that ground, for it would be injurious to paper credit, if it were necessary for an indorsee to ascertain before he takes a bill, whether it was stamped or not previous to its being made^a. It being found that the above statute frequently induced a hardship on the holders of bills, the legislature passed a temporary act^b, whereby the commissioners of His Majesty's stamp duties, on proof by the holder that no fraud on the revenue was intended, were authorized to stamp bills, &c. after they were drawn, on payment of a certain penalty; but at present, as the power of the commissioners under this act has long since expired, the holder of a bill has no remedy thereon, if it is either *unstamped*, or bears a stamp of an *inferior* value to that required by the act of

^a Peake, 173.^b 34 Geo. III. c. 32.

parliament. An authority, however, was given PART I.
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It is to be observed, that although none of our acts of parliament require any stamp on a foreign bill made out of this country, yet as the courts

^c 31 Geo. III. c. 25, s. 19. M. T. 1796.—Bayl. 20,

^d Manning v. Livie, cor. n. c.
Lord Kenyon, Sittings after

will

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will take notice of the revenue laws of a foreign country, and will resort to the laws of the country in which the instrument was made, every bill must be stamped as required by the laws of the country where made, or otherwise the holder cannot recover upon it^e.

(2)—It is proper in all cases to superscribe the *name of the place where the bill is made*^f; and where the maker is not a person well known in the commercial world, it is advisable for him to mention the number of his house, and the street in which he resides, in order that the holder of the instrument may be the better enabled to find him out in case his responsibility is doubted, or in case acceptance or payment is refused by the drawee. According to the form of the schedule contained in the 17th G. III. c. 30, in certain cases where bills are under 5l. it is absolutely necessary to insert the name of the place where they are made.

(3)—As the time when a bill becomes due is generally regulated by the time when it was made, the *date* of the instrument ought to be clearly expressed^g; and although it is the common practice to write the date in figures, yet in order to prevent intentional or accidental alteration, which may invalidate the instrument even in the hands of an innocent holder^h, it is advis-

^e *Alves v. Hodgson*, 7 T.R.

241.—*Esp. Ca. N.P.* 528.

^f *Beawes*, pl. 3.

^g *Beawes*, pl. 3, et Mar. 2d

ed. 91.

^h 4 T. R. 320.

able to write the date at full length, in words. A PART I.
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 date, however, is not in general essential to the validity of a bill; for where a bill has no date, the time, if necessary to be enquired into, will be computed from the day it was issuedⁱ. By the statute 17 G. III. c. 30, however, it is enacted, that all bills of exchange, or drafts in writing, being negotiable, or transferable, for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or on which twenty shillings, or above that sum, and less than five pounds, shall remain undischarged, shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto.

(4)—There is no necessity for the *superscription of the sum* for which the bill is payable, provided it is mentioned in the body of the bill; but it is the advice of Beawes^j, that the sum payable be expressed so distinctly both in words and figures, that no exception can be taken to the instrument; and it is now the usual mode, to superscribe the sum payable, in figures at the head of the instrument, and in words in the body of it.—In drawing a check on a banker, the sum is generally subscribed at the bottom of the instrument.

(5)—By a French ordinance, it is required that bills of exchange made in that country, express

ⁱ 2 Lord Raym. 1076.—4 Leases, L. 1.—Com. Dig. tit. T. R. 337.—Bac. Ab. tit. Fait. B. 3.

^j Pl. 3, et vid. Mar. 139.

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the time when they are to be paid, or otherwise they will be invalid^k; but there being no positive regulation affecting bills in this country, they would be valid, although no time was mentioned in them, and would operate as in the case of a check on a banker, as payable on demand^l. It is advisable, however, in all cases, to express the period for payment as clearly and intelligibly as possible^m, and it is therefore usual to write it in words, particularly as they are less subject to alteration than figures; and where a bill is drawn in one country using one style, and payable in a country using another, it is said that the drawer sometimes makes the date both according to the old and the new styleⁿ.

With respect to the length of time, this seems to be in general entirely dependant on the agreement of the parties. But by the 17th G. III. c. 30, negotiable bills and drafts under 5l. of the description above mentioned, must be payable within twenty-one days after the day of the date thereof. The operation of this act is suspended with respect to drafts payable to bearer on demand, by the statute 37 Geo. III. c. 32. Foreign bills are frequently drawn payable at usance, or usances, but they, like inland bills, may be drawn payable at sight, at days, weeks, months, or years, after sight or date, or on demand: bills, however, are very seldom drawn payable on demand; but usually, where it is in-

^k Poth. pl. 32.

^l 7 T. R. 427.

^m Beawes, pl. 3.

ⁿ Kyd, 8.

tended

tended they should be payable immediately, are drawn payable at sight. If drawn at sight, the drawer of a foreign bill should express that it is payable according to the course of exchange at the time of making it^o; or otherwise, it seems that the drawee must pay according to the exchange of the day when he has sight of the bill. Drafts on bankers very seldom express any time when they are to be paid, and consequently, as will be seen hereafter, are demandable immediately they are delivered to the payee.

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With respect to the time when a bill drawn payable in either of these ways becomes due, the reader is referred to that part of the work which treats of the presentment for payment.

(6)—It is said by Beawes, in his *Lex Merc^a*, that payment of a bill should be *ordered* and commanded: it is sufficient, however, if it is requested^q; and according to Marius^r, the directions to pay the money need not be contained in the body of the bill, or even on the same side of the paper.

(7, 8)—In the case of *foreign* bills, it is usual to make *three of the same tenor*, in order that the bearer, having lost one, may receive his money on the other^s. But if the drawer only gives one, he will, if it should be lost, be obliged

^o "En especes au cour de ce jour." Poth. pl. 174.
^p Pl. 3.

^q Ld. Raym. 1397.—4 T.R. 149.—Esp. Ca. N. P. 129.
^r Page 34, et 4 T.R. 149.
^s Poth. pl. 39.

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to give another of the same tenor to the loser'. Each part contains a *condition, that it shall be paid provided the others are not*. It is observed that this condition should be inserted in each part, and should in each, mention every other part of the set; for if a man, with an intention to make a set of three parts, should omit the condition in the first, and make the second with a condition mentioning the first only, and in the third alone take notice of the other two, he might perhaps in some cases be obliged to pay each; for it would be no defence to an action on the second, that he had paid the third, nor to an action on the first, that he had paid either of the others. And it is further observed, that an omission is not, perhaps, material, which upon the face of the condition must necessarily have arisen from a mistake, as if in the enumeration of the several parts, one of the intermediate ones were to be omitted, for instance, "Pay this my first of exchange, second and *fourth* not paid".

(9)—A bill of exchange should specify *to whom it is to be paid*; and it is said, that otherwise the instrument will be merely waste paper^v; but Pothier observes^w, that if the drawer has omitted to mention any person to whom the bill is to be paid, declaring in the bill, however, of whom he has received the value, it is but reasonable to construe the instrument to be payable to that person.

^v Id *ibid*.

^w Bayl. 15.

^v 1 H. B. 608.

^w Pl. 31.

When

When inserted, care should be taken that the name be properly spelled^x; and where there are two persons of the same name, it is advisable to describe the payee in such a manner that no mistake can arise^y. And bills under 5l. described by the statute 17th Geo. III. c. 30, are required by that statute to express the names and places of abode of the persons respectively to whom or to whose order the same shall be payable. A bill may be drawn payable simply to bearer, and it will be in such case, as we shall see hereafter, transferable by delivery^z. In France, bills of this description were at first forbidden, but by a subsequent law they were re-established^a.—In that country, it appears that it was formerly usual to make bills payable to a person whose name was left in blank, in order that the holder of a bill, when he was desirous of not being known, might fill it up with any name he chose; but as these bills were employed as a cloak for usury and fraud, they were afterward prohibited^b. These bills seem to have been in the nature of those payable to a fictitious payee, the validity of which has been so frequently and fully discussed of late in our courts of justice; the result of which discussion seems to be, that a bill payable to a fictitious person or his order, is in effect a bill payable to bearer, and may be declared on as such against all

^x Beawes, pl. 3.

^y 4 T. R. 28.

^z 4 Burr. 1527.

^a Poth. pl. 221.

^b Arrêts de Reglemens de la Cour du 7 Juin, 1611, et du Mars, 1624.

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the parties knowing that the payee was a fictitious person. The use, however, of these fictitious names, has been highly censured, and the person indorsing the fictitious name on the bill, to give it currency, would be guilty of forgery^c. As it is not necessary, or essential to the validity of a bill of exchange, that there should be three parties to it, a bill may be drawn payable to the drawer himself^d, though in such case it is said to be more in the nature of a promissory note. A bill may likewise be payable to one for the use of another^e.

(10)—As the commercial advantage to be derived from the *negotiable quality* of bills of exchange, was the only reason why our courts of justice gave to them the effect of instruments, and introduced in their favour an exception to the rule relative to the assignment of *rhoses* in action, it was once thought, that unless they possessed that quality, they would have no greater effect than that of mere evidence of a contract^f. It is however at present well established, that it is not essential to the validity of a bill, as an instrument, that it should be *transferable* from one person to another^g. If, however, it is intended to be negotiable, care must be taken that the operative words of transfer commonly used in bills,

^c 3 T. R. 174, 182, 481.—
1 H. B. 313, 569.

^d 1 Salk. 130, *et ante* page 22.

^e Carth. 5.—2 Ventr. 307.

—Skin. 264.—6 T. R. 123.

^f 3 Wils. 211.

^g 6 T. R. 123.—7 T. R.

243.—Smallwood v. Rolfe,

Sel. Ca. 18.

should

should be inserted therein^h. The usual modes of making a bill transferable, are by drawing it either payable to *A. B. or order*, or to *A. B. or his assigns*, or to *A. B. or bearer*, or to the drawer's own order. The use, operation, and effect of each of these forms of words, will be pointed out hereafter, in that part of the work which treats of the *transfer* of bills and checks.

(11)—The *sum* for which the bill is drawn, should be clearly expressed in the body of it, and, as has been before observed, it is usual to write it in figures at the head, and in letters at length in the body of the bill, in order the better to prevent alterationⁱ. Care should be taken that the sum is appropriate to the stamp. If the sum in the superscription of the bill is different from that in the body of it, the sum mentioned in the body will be taken, *prima facie*, to be the sum payable^j. With respect to foreign bills, there is no restriction as to the sum for which they must be made payable; but it is otherwise with respect to inland bills, and drafts, which are forbidden to be drawn for any sum under twenty shillings, by the statute 15 Geo. III. c. 51, under the penalty of 20*l*.

(12)—It appears, that in France it was not only essential to the validity of a bill, that it should express whether or not value had been re-

^h Beawes, pl. 3.—3 Wils. 211.

^j Beawes, pl. 193.—Mar. 2d ed. 138, 9.

ⁱ Poth. pl. 35, 99.—4 T. R. 320.

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ceived, but likewise the nature of the consideration which constituted the value^k; but in this country it is otherwise, for *value received* is implied in every bill and indorsement, as much as if expressed in *totidem verbis*^l; and though there are some old cases^m on the question, whether *indebitatus assumpsit* would lie on a bill of exchange, in which it appears there was a distinction made between a bill importing to have been given for value received and one not containing those words, and it was held that in the first case the drawer was chargeable at common law, but in the latter on the custom onlyⁿ, yet it is now settled, that there is no such distinction, and that a bill need not contain the above words^o. To entitle, however, the holder to recover interest and damages against the drawer and indorser, in default of acceptance or payment, a bill must contain the words *value received*^p. This is so important a distinction, that the inserting these words is in all cases advisable.

It may not be improper, under this head, to make a few observations relative to the *consideration* on which a bill of exchange may be origi-

^k Poth. pl. 8, 34.

^l Claxton v. Swift, 2 Show. 496.—White v. Ledwick, B. R. H. 25 G. III. Bayl. 13, n. a.—Ld. Raym. 1481.—Fort. 282.—8 Mod. 267.—1 Barnard, 88.—Lutw. 889.—1 Mod. 310, acc. 3 Wils. 212.—2 Stra. 1212, *semb. contra*.

^m Skin. 346.—12 Mod. 345.—Bayl. 95, n. a.

ⁿ Beawes, pl. 233.—Show. 5.—Vin. Ab. tit. Bills of Exchange, G. 2.

^o Same cases as those in note l.

^p 9 and 10 W. III. c. 17.—3 and 4 Ann, c. 9, s. 4.

nally founded, or which may pass between the assignor and assignee on the transfer of it; and in making this enquiry, it will be advisable to point out, 1st, when the want of a consideration can be taken advantage of; and 2^{dly}, when the illegality of it will render the bill either partially or totally inoperative.

It has been already observed, that although in general a simple contract will be inoperative, unless it is founded on a sufficient consideration, which in general it is incumbent on the plaintiff to state in his declaration, and to prove on the trial; yet, in the case of bills of exchange, which partake in this respect of the quality of a specialty, it is not in general necessary for the plaintiff to prove that he gave a good consideration^q, except where he brings an action as bearer of a bill transferable by delivery, and that only in suspicious circumstances^r. And though, as between the drawer and the acceptor, the drawer and the payee, and the indorsee and his immediate indorser, the *want* of consideration^s, or *sufficiency* of it^t, may be questioned, and where a bill is for accommodation only, and that circumstance is known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid for the bill^u; yet, in general, for reasons before

^q 2 Freem. 257.^r Burr. 1516.^s Stra. 674.—Esp. 117,

261.—2 T. R. 71.

^t Peake, 61, 216.—Esp.

Ca. Ni. Pri. 262.

^u Esp. Ca. Ni. Pri. 261.

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stated^v, wherever the Plaintiff has given a consideration, the defendant will not be at liberty to shew that he had received none, although the plaintiff knew that circumstance^w; and according to a late decision, where a bill is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such case the indorsee, though he has not given to the indorser the full amount of the bill, yet he may recover the whole, and be the holder of the overplus above the sum he has actually paid to the use of the indorser^x. In the case, however, of a person taking a bill by transfer after it is due, any party to the bill, who is sued by him, will in general, as will be seen hereafter, be at liberty to prove and insist on as a defence, his not having received any consideration.

In whatever cases the defendant is at liberty to insist on the want of consideration, he may also insist that the consideration was *illegal*^y; and where a third person having given a valuable consideration for a bill, knew that it was originally founded on an illegal one, he cannot recover on it^z. It has, however, been adjudged, that a per-

^v *Ante* chapter 1, page 9.

^w *Russel v. Langstaff*, Doug. 514.—3 T. R. 183.—Esp. Ca. Ni. Pri. 117, 261, 2.—Gilb. Eq. Rep. 154.—Burr. 1663.—1 Wils. 187.—4 T. R. 339.—Porti. pl. 118, 121.—Com. 43, and *Morris v. Lee*, there cited.—*Molloy*, pl. 28. 1 T. R. 40.—2 T. R. 71.—

2 Atk. 182.—Bul. Ni. Pri.

274.

^x Esp. Ca. Ni. Pri. 261.

^y 1 Bla. Rep. 445.

^z Esp. Ca. Ni. Pri. 166.—

6 T. R. 61, *acc.* *Potter v. Tubb*, Sarum Lent Ass. 1785.—Esp. Ni. Pri. 1 v. 46, *semb. contra*.

son who at the request of the holder of a bill has put his name upon it, and thereby been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid, in an action on the bill, from any person whose name is on it, although he knew it was given on an illegal consideration^a. In those cases in which the legislature has declared that the illegality of the consideration shall make the bill or note absolutely *void*, as where the consideration is wholly or in part signing a bankrupt's certificate^b, money lost by gaming, &c.^c, or for money lent on an usurious contract^d, the defendant may insist on such illegality, though the plaintiff, or some party between him and the defendant, took the bill *bonâ fide*, and gave a valuable consideration for it; and the innocent holder can in such case only resort to the party from whom he immediately received the instrument^e. But unless it has been so declared by the legislature, illegality of consideration cannot be set up as a defence in an action at the suit of a *bonâ fide* holder^f; and if the consideration upon which a bill or note was originally given, was not so illegal as to render the instrument absolutely void, a subsequent illegal consideration of any description given on the

^a Peake, 215.^b 5 G. II. c. 30, s. 11.—
Smith v. Bromley, Doug. 646.
—2 H. B. 647.^c 9 Ann, c. 14, s. 1.—Stra.1155, *acc.*—Carth. 356, *semb. contra.*^d 12 Ann, st. 2, c. 16.—
Lowe v. Walker, Doug. 736.^e Stra. 1155.^f Sel. Ca. 71.

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transfer, will never invalidate the instrument in the hands of a *bond fide* holder^a.

It may not be improper to observe in the present place, that in discounting a bill or note, it is not illegal to retain the discount, for it has been adjudged^b, that interest may as lawfully be received beforehand for forbearing, as after the term is expired for having forborne: and it shall not be reckoned merely as a loan of the balance, otherwise every banker in London who takes 5l. per cent. for discounting bills, would be guilty of usury: for, if upon discounting a 100l. bill at 5l. per cent. he should be construed to lend only 95l. then at the end of the time he would receive 5l. interest for the loan of 95l. principal, which is above the legal rate. But this doctrine seems only to apply to negotiable instruments, and not to bondsⁱ.

In addition to the legal interest of 5l. per cent. it is lawful for bankers to take the customary commission on bills or notes, and reasonable incidental expences, over and above the interest or discount^j. And where a country banker discounts bills, and receives interest for the whole time they have to run, but gives bills payable at thirty days sight in London instead of cash, such transaction will not amount to usury,

^a Esp. Ca. Ni. Pri. 274.

^b 2 Bla. Rep. 792, 3.—

3 Wils. 256.—Ord on Usury,
94.

ⁱ 3 Wils. 262.—Moor, 644.

—1 Buls. 20.

^j Winch, *qui tam v. Fenn*,
cited 2 T. R. 52.

unless

unless the terms of the remittance formed the con-
sideration of the loan^k.

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(13)—It is said by Marius, that if the drawer of a bill is to make himself debtor, then he inserts in the bill these words—"and put it to *my account*;" but if the drawee, or person to whom it is directed, is debtor to the drawer, then he inserts the following words—"and put it to *your account*;" and that sometimes, where a third person is debtor to the drawee, it is expressed in the bill thus—"and put it to the account of *A. B.*"; but, however, it is perfectly unnecessary to insert in a bill either of these sets of words.

(14)—The propriety of inserting the words, "*as per advice*," depends on whether or not the person on whom the bill is drawn is to expect further directions from the drawer or not. Bills sometimes are made payable "*as per advice*;" at other times, "*without further advice*"^m; and generally without either of these words. In the former case, the drawee may not, but in the latter he may, pay before he has received advice.

(15)—To give effect to the instrument, the *drawer's name* must either be subscribed at the bottom, or inserted in the body of itⁿ; and it must be written either by the person purporting

^k Sir B. Hammet v. Yea, Poth. pl. 36, 169.
Pul. & Bos. Rep. C. B. 155, ⁿ Beawes, pl. 3. — Lord
acc.—Peake, 200, *semb. contra.* Raym. 1376, 1542. — Stra.
¹ Mar. p. 27.—Com. Dig. 399, 609.—8 Mod. 307.
tit. Merchant, F. 5.—Rep.
T. Hardw. 1, 2, 3.

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to be drawer, or by some person authorized by him^o. If drawn and signed by an agent, it is usual to sign it as follows : *A. B. for C. D.* and if he does not express for whom he signs, he will be personally liable^p ; and if signed by one person for himself and partners, it is usual, and perhaps necessary, to sign it as follows : “ *A. B. for A. B. and Company,*” or to that effect^q.

It is not usual, nor indeed prudent, for the drawer of a bill or check to sign his name before it is filled up in every respect ; for if a man signs his name upon blank paper, stamped with a bill stamp, and delivers it to another to draw above the signature, he will be bound to pay any sum warranted by the stamp^r.

(16)—A bill of exchange being in its nature an open letter of request from the maker to a third person, must necessarily be properly *addressed* to that person^s.

This address, it is said, is usually made by the Italians and Dutch on the back of the bill ; but that the French in all cases, and the English in case of an inland bill, uniformly subscribe the direction at the bottom of it, in the form to which this paragraph refers ; and this latter mode is recommended as preferable to the other, because, as the paper on which a bill is usually written is but

^o Vid. chap. 2, page 24,
27, *ante*.

^p Id *ibid*.

^q Id page 30.—Ld. Raym.
1484.

^r 1 H. B. 313.

^s Poth. pl. 35.—Beawes,
pl. 3.—Mar, 143.

small, if the direction were on the back of it, PART I.
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(17-18)—The *place where the payment is to be made*, should be fully expressed in the subscription, or body of the bill^u; and if a bill be drawn upon a person not being at the place where the bill is intended to be paid, the place where the person lives who is to pay, as well as the place where payment is to be made, must be mentioned in the subscription^v.

The author considers it necessary here to apologize for the detail into which his anxiety to render his work generally useful, has induced him to enter, in discussing the several parts of a bill of exchange. The profession, to whom this detail is most useless, will at least, he trusts, acknowledge that many of the cases in which bills of exchange are the subjects of contest, arise from the ignorance of the parties as to some of the requisites.

BILLS of EXCHANGE are, like every other instrument, to be expounded in such a manner How bills and checks are construed. as, if possible, to give effect to the intention of the contracting parties; and, indeed, our courts,

^t Mar. 44.—Com. Dig. tit. Merchant, F. 5.

^u Mar. 107, 8.

^v Beawes, pl. 3.

sensible

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sensible how peculiarly conducive the negotiability of these instruments is to the ease and increase of trade, adopt, as will be presently seen, a still more liberal mode of construing them than other instruments.

It is observed by a sensible writer on moral philosophy^w, that every contract should be construed and enforced according to the sense in which the person making it apprehended the person in whose favour it was made, understood it; which mode of construction will exclude evasion, in cases in which the popular meaning of a phrase, and the strict grammatical simplification of words differ, or in general wherever the contracting party attempts to make his escape through some ambiguity in the expressions which he used. These observations are applicable to the mode of construing a bill of exchange. Thus, in a case before Lord Macclesfield, where a man for a past consideration gave a person a promissory note, in the beginning of which it was mentioned to be given for "twenty pounds borrowed and received," but at the latter end were these words, "which I promise *never* to pay," it was decided that the payee might recover on it as an instrument, because the person making the note had intentionally excited expectations which he ought to satisfy^x. So likewise it has been adjudged, that if a bill is drawn payable to the

^w Paley, 126.

^x 2 Atk, 32.

order of a fictitious person, it will *ut res magis valeat quam pereat*, be construed against all the parties privy to the transaction, as a bill payable to *bearer*, on the principle, that as they gave currency to the instrument, which they knew could never be paid to the order of the fictitious payee, the law will presume that they intended the formality of indorsement should be waived^y. The intention of the parties is also to be given effect to according to the law of the country where the contract is made, and not according to the law of the country into which either or all of them may remove^z; for what is not an obligation in one place, cannot by the laws of another country become such in another place^a. There appears, however, one exception to this latter rule of construction, with respect to the time of payment, which is in general to be calculated according to the laws of the country where the bill is made payable^b. It has been observed^c, that this is contrary to the reason and nature of the thing; but other writers entertain a different opinion; and it is said, that a bill of exchange is considered in this respect as having been made at the place where it is payable, according to that maxim, *contraxisse unusquisque in eo loco intelligitur*

^y 1 H. B. 386.

Burr. 1077.—1 H. B. 126.—

^z 2 Stra. 733.—Sel. Ca.

7 T. R. 242.—Skin. 272.

144.

^b Beawes, pl. 251.—Mar.

Pul. & Bos. Rep. C. B. 102.

141.—3 Vez. jun. 447.—

^c Kyd, 8,

2 H. B. 603.—Cowp. 174.—

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in quo ut solveret se obligavit, and that consequently the contract should be construed and regulated according to the laws and usages of that place to which the contracting parties have understood themselves subject, following that other rule, *in contractibus veniunt ea quæ sunt moris et consuetudinis in regione in quâ contrahitur*^d. It further appears, that although the *form* of the remedy must depend on the laws of the country in which it is pursued, it will in respect of the *extent* of it, be subject to the same regulations and restrictions as if it had been pursued in the country where the contract was made; and therefore, if a man in a foreign country enters into a contract, the fulfilment of which cannot in that country be enforced by arrest, he cannot in this country be held to bail^e.

It has been observed by a celebrated writer on the law of nations^f, that it is the first general maxim of interpretation, “that it is not allowable to interpret what has no need of interpretation;” and that when a deed is worded in clear and precise terms; when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed *naturally* presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. And if this dangerous method were once admitted, every deed

^d Poth. pl. 155.

^e 1 Pul. & Bos. Rep. 138.

^f Vattel, 224, et vid. Powell

on Contracts, tit. Construction.

might be rendered useless. It seems that on similar principles, our courts, notwithstanding their anxiety to give effect to the intentions of the contracting parties, have laid it down as a general rule, that all latitude of construction must submit to this restriction, namely, that the *words and language* of the deed bear the sense which is attempted to be put upon them. However, in the case of bills, and other negotiable instruments, our courts have introduced an exception to this rule, and therefore where an action was brought by an indorsee of a bill of exchange against the acceptor, and he could not prove an indorsement by the payee, evidence was admitted to prove that the payee was a fictitious person, and consequently could not indorse it; and it was adjudged, that as the drawer and acceptor knew of such fact, the bill should against them operate as a bill payable originally to bearer, and that the holder might recover thereon as such^g.

A BILL of EXCHANGE is delivered in general by the drawer to the payee, and where it consists of several parts, as is usually the case with foreign bills, each ought to be delivered to the person in whose favour it is made, unless one part is forwarded to the drawee for acceptance, and in that case the rest must be so delivered. Were it other-

Delivery of
a bill to
payee; and
effect there-
of.

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wise, difficulties might arise in negotiating a bill, or obtaining payment of it^h. Although in general, one simple contract cannot be extinguished by another, a person taking a bill of exchange in satisfaction of a former debt, for which he has not a security of a higher nature than a billⁱ, is not permitted afterwards to waive it, and sue the person who gave it him for the original debt before the bill is due, unless the person delivering it knew that it was of no value^j; for in such case the receipt of the bill amounts to an agreement to give the person delivering it credit for the length of time it has to run^k. It has also been adjudged, that when an account for goods sold, is settled, and the defendant gives a bill of exchange for the amount, but which bill is not paid, the defendant cannot, in an action founded on the consideration of such bill, go into evidence to impeach the charges in the first account, which has been settled, the giving of the bill being conclusive evidence of the sum due^l.

Conse-
quence of an
alteration in
a bill.

IF, while a bill is in the hands of the payee, or other holder, or in any other case, it is *altered* in any material respect, as for instance, in the date or sum, without the consent of the drawer, it will

^h Bayl. 15.

ⁱ Bul. N. P. 182.

^j 12 Mod. 517.—6 T. R. 52.—7 T. R. 64.

^k Esp. Ca. N. P. 5, 106.—

5 T. R. 513.—Salk. 442.—
Skin. 410.—Com. Dig. tit.

Merchant, F. 17.

^l Peake, 159.

dis-

discharge him, although the bill may afterwards come into the hands of an indorsee not aware of the alteration. And if it is altered after acceptance or indorsement, without the acceptor's or indorser's assent, such alteration will have the same operation with respect to their liability^m; but if it is altered before acceptance or indorsement, the acceptor or indorser cannot take any advantage of the alterationⁿ; and the consent of any one of the parties to the alteration, will in general estop him from taking advantage of it^o. In such case, however, a new stamp will be requisite, if the alteration was made after the bill was negotiated^p, or after it was due^q.

UPON delivery to the payee, the *obligations* to which the drawer is subject, immediately become complete.—By the very act of drawing a bill, a man enters into an engagement with the payee (unless indeed where he discounts the bill, or where it is otherwise agreed^r); and with every subsequent holder fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance; that he is to

Obligation
of the
drawer.

^m 4 T. R. 320.—5 T. R. Lord Kenyon, Sittings after 367.—2 H. B. 141.—1 Anstr. M. T. 1796.—Bayl. 24.

225.

ⁿ Mar. 138, 140.—Beawes, pl. 194.

^q 5 T. R. 537.—Esp. Ca. N. P. 81.

^o 4 T. R. 320.

^p Wilson v. Justice, cor. bill.

^r Vid. post. Of the obligation of the assignor of a

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be found at the place of which he is described to be, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept in writing on the bill itself, according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose. This engagement is in all its parts absolute and *irrevocable*, and therefore, where *A.* in England drew a bill of exchange on *B.* in a foreign country, who, by the laws of that country was prohibited from paying it, although it was urged that the undertaking of the drawer does not extend to the case of a prohibition to accept or pay the bill, imposed by the law of a foreign country in which the drawer resides, yet it was ruled in an action against the drawer, that this was no defence, it not being necessary for the holder to enquire for what reason the bill was not paid^s. The drawer will also be equally liable, whether the bill was drawn on his own account or on that of a third person. On failure in this engagement, in either of these cases, the drawer of a bill will *immediately*, before the time specified in the bill for payment, be liable to an action^t, not only for the principal sum, but likewise in certain cases for damages and interest, as a consequence of the bill not being honoured^u. Besides this obligation to the payee and holder, the drawer is likewise bound to indemnify

^s 2 H. B. 378.—Poth. pl. 58.

^t Milford v. Mayor, Doug. 54.—6 T. R. 52, 139.

^u 2 H. B. 379.—Poth. pl. 62.

the

the acceptor, if he should have no effects in hand, ^{PART I.}
for any loss he may sustain in consequence of his ^{CHAP. III.} acceptance^v. This obligation, though in its nature absolute and irrevocable, may be discharged by the laches or neglect of the holder, or by other means which will be spoken of hereafter.

^v Poth. pl. 97, 8, 9.

CHAPTER FOURTH^a.

OF PRESENTMENT OF A BILL FOR ACCEPT-
ANCE — ACCEPTANCE — NON - ACCEPTANCE
— CONDUCT WHICH THE HOLDER SHOULD
THEREUPON PURSUE; AND OF ACCEPTANCE
SUPRA PROTEST.

ON delivery of a bill of exchange to the payee, or any other person who becomes holder by transfer, which mode of acquiring an interest in a bill or check will be treated of in the following chapter, it is in some cases necessary, and in all advisable, to present it for acceptance, unless it has been previously accepted. On presentment, the drawee either complies with the drawer's request, by accepting the bill, or refuses to do so; in which latter case it is in general incumbent on the holder to give notice to the various persons who became parties to the bill antecedent to himself; after which any person not originally a party, may accept it *supra protest* for the honour of the drawer or indorsers. In considering each of these matters in their natural order, it will be necessary, in the *first* place, to point out when a present-

^a As a bill or check, when payable on demand, is never presented for acceptance, or accepted, the observations in this chapter will in general be inapplicable to those instruments.

ment for acceptance is necessary, and at what time and in what manner it must be made. PART I.
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Secondly, to consider by whom, at what time, and in what manner an acceptance may be made, and the obligation it imposes on the acceptor. *Thirdly*, to state the conduct which the holder must pursue, in case of a refusal to accept. And, *fourthly*, to make some observations relative to acceptance *supra protest*.

When a bill is drawn payable within a specified time after sight, it is necessary, in order to fix the period when the bill is to be paid, to present it to the drawee for acceptance^b; but in other cases it is never incumbent on the holder to present it before it is due^c, though it is certainly most advisable in all cases to get it accepted if possible^d, as by that means another debtor is added to the drawer, who becomes a new security, and consequently makes the bill the more negotiable^e. It is said indeed, that it is incumbent on the bearer of a bill, when he is but the mere agent of the person entitled to it, and on the payee, where he is directed by the drawer to do so, in all cases to present it for acceptance as soon as possible, because it is only by acceptance that the person on whom the bill is drawn becomes debtor, and responsible to the

SECT. I.—Of
presentment
for accept-
ance; & 1st,
when neces-
sary.

^b 1 H. B. 565.

Mar. 46.—Com. Dig. tit.

^c Molloy, b. 2, c. 10, s. 16.—Beawes, pl. 266.—1 T.

Merchant, F. 6, *semb. contra*.

R. 712.—Burr. 2670.—acc.

^d Mar. 48.—Poth. pl. 143.

^e Beawes, pl. 266.—Claxton v. Swift, 2 Show. 496.

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holder ; and if the affairs of the drawer should be deranged, an agent who has neglected to present the bill for acceptance, would be answerable in damages and interest to the person who employed him^f. If a person is holder of a bill which is not addressed to any particular individual, but is accompanied with a letter of advice, mentioning the person on whom the bill is drawn, it is said that the bill should be presented to the person mentioned in the letter of advice, who may thereupon accept the bill, and that if he refuses to do so, it may be protested for non-acceptance^g. In all cases where it would otherwise be necessary to present a bill for acceptance, the holder may, as will be seen hereafter, excuse his neglect to do so, by proving that the drawer or other person insisting on the want of it as a defence, had no effects in the hands of the drawee^h, or any other circumstance which will afford an inference that he could not have been injured by the holder's laches.

2dly, At what time presentment for acceptance should be made.

With respect to the time when bills should be presented for acceptance, it was observed in a late caseⁱ, that the only rule which can be applied to bills of exchange, whether the bills are foreign or inland, and whether they are payable at sight, at so many days after sight, or in any other manner, is, that due diligence must be used ; and, as the drawer may sustain a loss by the holder's keep-

^f Poth. pl. 128.—Mar. pl.

^h 2 H. B. 336, et post.

46.

ⁱ Per Buller J. in *Muilman*

^g Mar. 142, 3.

v. *D'Eguino*, 2 H. B. 569.

ing it any great length of time, it is advisable in all cases to present it as soon as possible^j. It was further said, that the question, what is a reasonable time? must depend on the particular circumstances of the case; and that it must always be for the *jury* to determine, whether any laches is imputable to the plaintiff^k; but from other cases it appears rather uncertain, whether what shall be considered as a reasonable time, is to be taken as a question of fact for the determination of a jury, or as a question of law for the determination of the court. It was said by Lord Mansfield^l, that what is reasonable time for giving notice (which observation, it is conceived, is equally applicable to the time when a bill must be presented for acceptance), is partly a question of fact and partly of law; it may depend in some measure on facts, such as the distance at which the parties live, the course of the post, &c. but that wherever a rule can be laid down with respect to this reasonable time, that should be decided by the court, and adhered to for the sake of certainty^m. Presentment should in all cases be made at the usual hours of businessⁿ; but a neglect to make a presentment at a proper time, may be excused by illness, or by some other cause or accident^o.

^j Poth. pl. 143.^m Appleton v. Sweetapple,^k Per Eyre Ch. J. 2 H. B. Bayl. 65, n. c. et post.

569.—7 T. R. 425.

ⁿ Mar. 112.^l In Tindal v. Brown, 1 T. R. 167.^o Vid. post.

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3dly, Mode
of presenting
for accept-
ance.

It is said, that *ex rigore*, the drawee ought to accept the bill immediately it is presented, or refuse to do so^p; as, however, it is but reasonable that the drawee should have an opportunity, before he determines whether he will accept or not, of seeing whether he has effects of the drawer's in his hands, the payee or holder usually leaves the bill with him twenty-four hours after the presentment, unless in the interim he either accepts, or declares a resolution not to accept^q; but it is said that this must not be done if the post goes out in the interim^r. If the drawee of a bill cannot be found at the place where the bill states him to reside, and it appears that he never lived there, or has absconded, the bill is to be considered as dishonoured^s; but if he has only removed, it is incumbent on the holder to endeavour to find out to what place he has removed; and to make the presentment there^t; and he should in all cases make every possible enquiry after the drawee, and if it be in his power, present the bill to him; though it will certainly be unnecessary to attempt to make such a presentment, if the drawee has left the kingdom, in which event it will be sufficient to present the bill at his house^u. If

^p Com. Dig. tit. Merchant, F. 6.

^q Lord Raym. 281.—Mar. 62.—Beawes, pl. 17.—Mal. b. 3, c. 5, s. 1.

^r Mar. 62.—Com. Dig. tit. Merchant, F. 6.

^s Lord Raym. 7.

^t Stra. 1087.—Bayl. 58.

^u Esp. Ca. Ni. Pri. 511.

on presentment, it appears that the drawee is PART I.
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ACCEPTANCE may be defined to be the act Sect. 2.—Of acceptance; and 1st, by whom it may be made. by which the drawee, or some other person, evinces his consent and intention to comply with, and to be bound by, the request contained in a bill of exchange directed to him or some other individual. When the holder of a foreign or inland bill presents it for acceptance, he is entitled to insist on such an acceptance by the drawee as will subject him at all events to the payment of the bill according to the tenor of it; and consequently such drawee must have capacity to contract, and to bind himself to pay the amount of the bill, or it may be treated as dishonoured. An acceptance may, as has been already observed in a preceding chapter, be made by an agent; but in such case, it will be incumbent on the agent, if required, to produce his authority to the holder, as, if he do not, the holder may consider the bill as dishonoured, and act accordingly^w. And it may perhaps be doubtful, whether the holder is in any case bound to acquiesce in an acceptance by agent, as it multiplies the proof which he will

^v Molloy, b. 2, c. 10, s. 34.—Poth. pl. 146. ^w Beawes, pl. 87.

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be obliged to adduce, in case he is compelled to bring an action on the bill^x.

The act of one partner, as has been before shewn, being considered as the act of both, acceptance by one for himself and partner, will in general be a compliance with the request of the drawer; but if the bill is drawn on two, not being partners, and it is only accepted by one, it must be protested^y. The competency of the contracting parties in general having been already discussed, it will be unnecessary to make any observations relative to the capacity of the acceptor: it may, however, be observed, that if the holder finds that the drawee is an infant, *feme-covert*, or otherwise incapable of contracting, he may treat the bill as dishonoured.

2dly, At what time an acceptance may be made.

A bill, on presentment for acceptance, must be accepted by the drawee within twenty-four hours, or in default thereof, it is liable to be treated as dishonoured. This space of time, as has been before observed^z, is allowed the drawee to give him an opportunity of examining into the accounts between himself and the drawer: if, however, the drawee refuses to accept within the twenty-four hours, it is not incumbent on the holder to wait till the expiration of them, but he may instantly consider the bill as non-accepted.

^x Esp. Ca. Ni. Pri. 115, 269.

^y Holt, 297.—Mar. 64.—Beawes, pl. 228, *et ante* 29.

^z *Ante* 70.

Although

Although the term acceptance, supposes a bill of exchange existing at the time when the acceptance is made^a, it seems that an agreement to accept in future a bill not in existence at the time of such agreement, will have the same operation as the acceptance of a bill subsequent to its formation. This, with respect to an engagement to accept, contained in a letter or other writing, is evident from the cases of *Pillans against Mierop*^b, and *Powell v. Monnier*^c; and although it has never been expressly decided that the mere writing of a name at the bottom of a blank piece of paper will have the operation of an acceptance, yet there can be no doubt that it will have such an effect, it having been decided^d that an indorsement written on a blank stamp, will afterwards bind the indorser for any sum and time of payment which the stamp will admit, and which the person to whom he entrusts it chuses to insert; and that a person signing his name to a blank paper, and delivering it to another person, for the purpose of drawing a bill in such manner as he should chuse, was bound by such signature as drawer^e. Acceptance being an absolute undertaking to pay, may be made even after the time appointed for payment of the bill, so as to bind the acceptor, though it would discharge the drawer and indorsers, unless due notice

^a Doug. 515.^b Burr. 1663.^c 1 Atk. 611.^d In *Russel v. Langstaff*,
Doug. 514.^e 1 H. B. 313.

of non-acceptance or non-payment at the time the bill became due, was given^f; and in such case, the acceptor would be liable to pay the bill on demand^g. It is observed^h, that the drawee, although he has effects of the drawer's, ought not to accept bills after he is aware of the failure of the drawer, because after that event, one creditor of the drawer ought not to be paid in preference to another; as, however, payments made to a bankrupt without knowledge of his being so, are protected by the 1st Jac. I. c. 15, s. 14, and as an acceptance of a bill for a precedent debt, has always been deemed a payment in satisfaction, provided the bill is honoured when due, there is no doubt, and indeed it has been so decided, that if a person not having notice of the bankruptcy of the drawer, accepts a bill drawn on him after such bankruptcy, he will be justified in paying his acceptance, although he has afterwards heard of the bankruptcyⁱ.

3dly, How an acceptance may be made: of absolute, conditional and partial acceptances; and what amounts thereto.

On presentment for acceptance, the drawee makes an *absolute*, a *conditional*, or a *partial* acceptance, or *refuses* to accept. The holder may in all cases insist on an *absolute* acceptance, and in default thereof, may consider the bill as dishonoured^j. If, however, he is satisfied with a conditional acceptance, or with one varying from the

^f 12 Mod. 410.

^g Ld. Raym. 364, 574.—
Salk. 127, 129.—Carth. 45.—
12 Mod. 410.—Comyn, 75.—
Beawes, pl. 224.

^h Poth. pl. 96, et vid. 2 H.
B. 334, and cases there cited.
ⁱ 7 T. R. 711.
^j Poth. pl. 47.

tenor of the bill, such acceptance will be obligatory on the acceptor ; and if notice thereof is given to the other parties to the bill, will not discharge them from their obligation. Premising as a general rule, that what amounts to an acceptance is a question of law, and not of fact^k, each of these will be considered in its order.

An *absolute* acceptance is an engagement to pay the bill according to its tenor. The usual mode of making an absolute acceptance, was formerly by parol ; but as men frequently denied their acceptance of bills, merchants soon universally adopted written acceptances, as more easy and capable of proof. At present, the usual mode of accepting a bill, is either by writing thereon the word "*accepted*," and subscribing the *drawee's* name, or writing the word "*accepted*" only, or by merely subscribing the *name*. Where it is an acceptance of a bill payable after sight, it is usual to write the day also on which the acceptance is made^l. When it is made by one partner only, on the partnership account, it should express that he accepts for self and partner^m ; and when by an agent for his principal, it is usual and necessary for him to specify that he does it as agent, as otherwise it will make him personally responsibleⁿ. It has been adjudged, that if a bill is made payable in a city or large town gene-

^k 1 T. R. 182, 186.

^l Beawes, pl. 266.

^m ante 2d chap. page 30.

ⁿ Poth.pl.118.—1 Stra.955.

—1 T. R. 172, et ante chap. 2,
page 27.

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rally, it must be made payable by the acceptance at some particular house or place there, and if not, that the holder may protest it; which seems extremely reasonable, as otherwise it would be difficult in many cases for the holder to find out the residence of the drawee^o. The holder of an inland bill expressed to be made for value received, and payable after date, may insist on having a *written* acceptance; and in default thereof, may treat the bill as dishonoured^r. As, however, in general, no formal act is required to constitute a simple contract, and any mode which demonstrates an intention to become bound by it, will have an obligatory force on the contracting party, any act of the drawee which evinces a consent to comply with the request of the drawer, will constitute an acceptance. Thus the word "seen"^a "presented"^r, the day of the month^s, or a direction to a third person to pay the bill^t, written thereon, or on any other paper relating to the transaction^u, will amount to an acceptance. Nor is it necessary that an acceptance should be in writing, it having been frequently adjudged that a *verbal* acceptance is as obligatory on the drawee as a written one^v. An acceptance may also be *implied*

^o Comyns, 75.—Ld. Raym. 574.

^p 3 & 4 Ann, c. 9, s. 5.

^q Poth. pl. 45.

^r Vin. Ab. tit. Bills of Exchange, I. 4.

^s Comb. 401.

^t Moor v. Whitby, Bul. Ni. Pri. 270.

^u Stra. 648.—Burr. 1663.

^v R. T. Hardw. 74, 278.—

Stra. 1000.—Holt, 297.—Mar. 65.

as well as express; thus it may be inferred from the drawee's keeping the bill a great length of time^w, or by any other act which gives credit to the bill, and induces the holder not to protest it^x, or is intended as a surprize upon him, and to induce him to consider the bill as accepted^y. A *promise* to accept at a *future* period, whether made to the drawer or not, as for instance, a promise contained in a letter, to accept such bills as the plaintiff should draw on the defendant at a future day, on account of a debt due from a third person to the plaintiff, will in all cases operate against the person making it, as an absolute acceptance^z. A verbal promise of the same nature, as for instance, "leave the bill, and I will accept it"^a, will also amount to a complete and absolute acceptance, although the drawee had no consideration for the promise^b; but in this respect there is a distinction between a promise to accept in future, made on an *executed* consideration, and a promise made on an *executory* consideration: the latter will not bind while the consideration remains executory, unless it influences some person to take or to retain the bill^c; and in all cases, if the promise to accept in future is obtained from the drawee by any fraud or misrepresentation, it will not bind him^e.

^w 1 Atk. 611.—Rep. T. loy, b. 2, c. 10, s. 20.—Mar. Hardw. 278.—Poth. pl. 46. 17, acc. Cowp. 573, *semb.*

^x Bul. Ni. Pri. 270.

contra.

^y Peach v. Kay, Bayl. 48, n. a.

^b Burr. 1669.

^c Bayl. 49, cites Pillans v.

^z Burr. 1672.—Cowp. 571.

Mierop, Burr. 1669.

^a Bul. Ni. Pri. 270.—Mol.

^e Burr. 1669.

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However, to constitute an acceptance, there must be some circumstance from whence it may be inferred that the drawee imagined he had induced the holder to consider the bill as accepted^f; and therefore an express refusal to accept, as, "I will not accept the bill"^g; or an answer given by the drawer when the bill is called for, "there is your bill; it is all right"^h, cannot be construed into an acceptance, unless intended as a surprize on the party, and to make him consider it as an acceptanceⁱ. And where the drawee, after a refusal to accept, on the ground that he had no effects, promised to attempt to procure payment for the holder, because he had just received some effects; on which the bill was presented to him, and he desired the holder to leave it, and said, that he would examine into it, whereupon the bill was left with him eight or ten days, and was then called for, on which the drawee offered to let the holder sell some of the effects, and pay himself; this conduct was adjudged not to amount to an acceptance^j. So likewise, it has been determined, that if the drawee of a bill says he cannot accept without farther directions from *I. S.* and *I. S.* afterwards desires him to accept, and draw upon *A. B.* for the amount, the mere drawing a bill upon *A. B.* will not amount to an abso-

^f *Ante* 58.^g *Peach v. Kay*, Bayl. 48, acc. Rep. T. Hardw. 75, *in notis* (where a written refusal is saidto amount to an acceptance), *contra*.^h *Esp.* 17.ⁱ *Id* *ibid*.^j *Rep. T. Hardw.* 278.

lute acceptance, nor can become such before the bill on *A. B.* is paid^k. PART I.
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In all cases where the undertaking is doubtful, the drawee will be at liberty to prove some circumstance which does away the presumption; as, where a bill was sent by post to the drawee for acceptance, and he entered it in his bill-book, wrote upon it the number of the entry, and kept it ten days, and on the tenth day minuted on it the day of the month, and returned it, saying he could not accept, it was adjudged that these circumstances did not constitute an acceptance, it being proved that it was the drawee's practice to enter all his bills, whether he meant to accept them or not^l.

If the drawee of a bill is desirous not entirely to dishonour it, he may, if he chuses, make such an acceptance as will subject him to the payment of the money only on a contingency, in which case the acceptanee is called *conditional*. The holder is not bound to acquiesce in such acceptance. If he receives it, he should, as will be seen hereafter, give immediate notice to the other parties to the bill, of the nature of the acceptance offered; by which means those parties will not be discharged from payment of the bill in case the drawee should not pay. It is unnecessary to adduce all the cases in which it has been determined that the acceptance was conditional; for any act

^k 1 T. R. 269.

^l Powel v. Monnier, 1 Atk. 611.

which

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which evinces an intention not to be bound, unless upon a certain event, will be sufficient to give the acceptance the operation of a conditional one.— Thus an acceptance by the drawee of a bill, to pay “as remitted for”^m, “on account of the ship *Thetis*, “when in cash for the said vessel’s cargo”ⁿ, a promise to accept a returned bill “when it shall “come back”^o, or to accept “as soon as he “should sell such goods”^p; an answer that the bill would not be accepted till a navy bill was paid^q; or that the drawer had consigned a ship and cargo to him (the drawee) and another person at Bristol; but as he could not then tell whether the ship would arrive at London or at Bristol, he could not accept at that time’—have been adjudged to operate as conditional acceptances, and as not rendering the drawees liable to the payment of the bills until the contingencies should take place. But an answer by the drawee, that he would pay if another person would not, was construed to amount to an absolute acceptance, it appearing that the drawee held himself liable at all events, and that from other circumstances, it was not intended as a conditional acceptance*. A conditional acceptance has the same obligatory force as an absolute one; and in fact becomes such, as soon as the event has happened on which the

^m Stra. 1212.ⁿ 2 Wils. 9.^o Cox v. Coleman, cited in Lumley v. Palmer, Rep. T. Hardw. 74.^p Stra. 1152.—12 Mod.

447.

^q Cowp. 571.^r 1 T. R. 182.^s Stra. 648.

drawee

drawee undertook to pay the bill^t. With respect to the mode of annexing such condition, it is well observed; that if a man intends to make a conditional acceptance; and accepts in writing, he should be careful to express in such written acceptance, the condition he may think proper to annex; for if the condition be not in writing, he will not be at liberty to avail himself of it against any subsequent party, if either such party, or any intermediate one between him and the person to whom the acceptance was given, took the bill without notice of such condition, and gave a valuable consideration for it; and at all events, the *onus* of proving such condition will be upon the acceptor^u.

A *partial* acceptance; is an acceptance varying from the tenor of the bill, as where it is made to pay part of the sum for which the bill is drawn^v, or to pay at a different time^w, or place^x: These species of acceptance; though the holder may refuse each, will bind the acceptor. An acceptance may likewise vary from the tenor, in the manner in which the acceptor undertakes to pay the bill^y; as for instance, part in money, and part in bills. In either of these cases, as we shall see hereafter, the

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^t Stra. 1212.—R. T. Hardw. —2 Molloy, pl. 26.—Mar: 74.—Cowp. 571.—1 T. R. 68, 85.—Poth: pl. 48.

182.—Lewis v. Orde, 1 Gil. ^w Molloy, 283.

Evid. by Loft, 179. ^x 11 Mod. 190.—Stra.

^u R. T. Hardw. 1, 2, 3.—1194.—Smith v. De la Fon-

Bayl. 51, cites Mason v. taine, Bayl. 78, n. 2.—Mar.

Hunt, Doug. 296. 84.—Poth. pl. 49.

^v 1 Stra. 214.—Comb. 452. ^y Comb. 452.

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holder, if he means to resort to the other parties to the bill in default of payment, should give notice to them of such conditional or partial acceptance^z; and should, if he means to avail himself of any advantage under the acceptance, express in his notice, the nature of it; for any act, from whence it may be collected that he does not acquiesce in the acceptance, such as a general notice of non-acceptance, will be a waiver of it^a.

4thly. The obligation imposed on the acceptor by acceptance.

The nature and extent of the obligation which the act of acceptance imposes on the drawee, may in a great measure be collected from the preceding part of this chapter, in which it has been shewn that an absolute acceptance is an engagement to pay according to the tenor of the bill^b, and a conditional or partial one, to pay according to the tenor of the acceptance^c. It has been already observed, that as the interests of third persons are generally involved in the efficacy of a bill, an acceptance will, when the bill is in the hands of a third person, be obligatory on the drawee, though he received no consideration for it, although the holder knew that circumstance^d: on which principle it has been decided, that an acceptance by an executor on account of debts due from his testator, is an admission of assets, and will there-

^z Mar. 6^o, 85.

^a 1 T. R. 182.

^b Poth. pl. 164.—4 T. R. 174.—Bayl. 42.

^c Poth. pl. 115, 6, 7.—Bayl. 42.

^d 1 Wils. 187, 8.—3 T. R.

183.—4 T. R. 339.—Poth. pl. 118, 121.—Molloy, pl. 28.

fore make him personally responsible, in case there are no effects of the testator in his hands^e.

This obligation is irrevocable^f; nor can it in general be discharged by any other act than payment by the acceptor, or by some other person^g.

If, however, by the laws of a foreign country where the acceptance was made, the obligation is by any act vacated, it will no longer have any obligatory force in this country^h; and by the consent of the holder, it may in all cases be waived or released. With respect to the manner in which it may be waived or discharged, it may be observed, that the general rule of law is, that although a simple contract, previous to the breach of it may be discharged by parol, yet, if it is once broken, then it cannot be discharged without a release in writingⁱ; but in the case of a bill it is otherwise; and the courts have gone so far as to decide, that what amounts to an assent to discharge the acceptor, is a question for the jury, arising out of the circumstances of the case^j; from whence it may be inferred, that any act indicating an intention to relinquish the right of action,

^e 1 H. B. 622.—3 Wils. 1.—2 Stra. 1260.—2 Barnes, 137.—2 Burr. 1225.—1 T. R. 487.

^f Mar. 83.

^g Poth. pl. 76, 118.—Mar. 83, 145, 6.—1 H. B. 88.

^h Stra. 733.—Sel. Ca. 144, et ante 59.

ⁱ 2 Mod. 43, 259.—Cro.

Car. 383.—May v. King, Cases K. B. 538.—Vin. Ab. tit. Release.—Com. Dig. tit. Pleader, 2 G. 13. et tit. Action on the case in assumpsit, G.

^j Ellis v. Galindo, cited in Dingwall v. Dunster, Doug. 247.

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will be sufficient: but that decision appears in some measure to be contradicted by the case of *Dingwall against Dunster*^k, where the court decided, that nothing but an express consent, or the statute of limitations, would discharge the acceptor; and that no indulgence would have that operation. It has also been adjudged, that a release by the holder to the drawee, after the bill is drawn, and before acceptance, will not discharge him from the obligation raised by a subsequent acceptance, because he was not chargeable at the time of the release^l. What amounts to an express waiver, must depend on the circumstances of each particular case; an agreement to consider an acceptance as at an end^m; or a message to the acceptor upon an accommodation bill, that the business has been settled with the drawer, and he need give himself no further troubleⁿ, have been determined to amount to a waiver of an absolute acceptance; but it may be doubtful whether the holder's receiving a part of the money due on a bill from the drawer, and taking a promise from him upon the back of it for the payment of the residue at an enlarged time, will amount to a discharge of the acceptor^o; and it has been adjudged, that an alteration made by the holder of a bill,

^k Doug. 247, et vid. *An-
derson v. Cleland*, Esp. Ni.
Pri. 46.

^l Lord Raym. 65.

^m *Walpole v. Pulteney* cit-
ed Doug. 247.

ⁿ *Black v. Peele*, cited
Doug. 247.

^o *Ellis v. Galindo*, cited
Doug. 248.

of a partial acceptance into an absolute one, will not be a waiver or discharge of the acceptor's liability under his partial acceptance^p. If the holder of a bill of exchange agrees not to sue the acceptor, upon his making affidavit that the acceptance is a forgery, and such affidavit is accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit is false^q. Where a bill is accepted in consideration of the future consignment of goods to the acceptor, and the prospect of the profit of the commission on the sale thereof, and the holder of the bill, aware of the nature of the acceptance, agrees to take, and receives the bill of lading, &c. from the acceptor, which were the consideration of the acceptance, the acceptor is by this act of the holder discharged from the liability imposed on him by his acceptance^r. He is also discharged in the case where, as has been before observed, the holder, upon an offer by the drawee of a conditional or partial acceptance, gives a general notice of non-acceptance to any of the antecedent parties, omitting to mention in such notice the nature of the acceptance offered^s. The drawee will likewise be discharged from his liability in the case of an acceptance payable at a banker's, if it is not presented there; and he can prove that he has

^p See *Price v. Shute, Beawes*, pl. 222.—*Molloy*, pl. 28.—4 T. R. 336.

^q *Peake*, 187.—*Esp. Ca. Ni. Pri.* 178.

^r *Mason v. Hunt, Doug.* 298.

^s 1 T. R. 182.

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Sect. 3.—Of non-acceptance; and the conduct which the holder should thereupon pursue.

THE enquiry into the conduct which the holder of a bill of exchange should pursue, on an absolute refusal to accept, or on the offer of a conditional or partial acceptance, may be made under the following heads:

First, when notice is requisite. *Secondly*, what is the proper mode of giving notice. *Thirdly*, the time when it must be given. *Fourthly*, by whom it must be given. *Fifthly*, to whom it should be given. *Sixthly*, of the liability of the parties on receiving notice. And *Lastly*, of the consequences of the holder's laches, in omitting to give notice.

1st. When notice of non-acceptance is necessary.

It has already been observed, that a presentment for acceptance is only necessary where a bill is made payable within a certain period after sight: if, however, in that, or any other case, a bill is presented, and an acceptance is either altogether refused, or only a conditional or partial acceptance is offered, notice must be given as soon as possible to the persons to whom the holder means to resort for payment, or they will in general be totally discharged from their respective obligations². From some cases to be found

¹ Stra. 1198, *acc.* Smith v. De la Fontaine, Bayl. 78, n. a, *semb. contra.* ² Burr. 2670.—1 T. R. 712.—Ventr. 45.—Poth. pl. 133.

in the books^v, it appears to have been once held, that it was incumbent on the person insisting on the want of notice, to prove that he had sustained damage by the laches of the holder; but it has been settled by later decisions, that the *holder* must, in excuse for the omission to give notice, prove that the person insisting on the want of it, did not sustain any damage, or at least must adduce in evidence, such facts as may afford an inference to that effect, and thereby throw the *onus probandi* of actual damage on that person; for it is always presumed that the maker of a bill has effects in the drawee's hands, and that the indorser or assignor has given value for it, and consequently that each may have sustained a loss by the holder's neglect to give notice^w, whereby the chance of obtaining satisfaction from the parties liable, must necessarily be rendered more precarious.

It has been frequently adjudged, that if the drawer of a bill, from the time of making it to the time when it was due, had no effects in the hands of the drawee or acceptor, he is *prima facie* not entitled to notice of the dishonour of the bill^x; and that the payee of a promissory note, indorsing it to give it currency, and knowing of the insolvency

^v Show. 318.—Mod. 27.—R. 182.—Ventr. 45.—2 H. 12 Mod. 15.—Comb. 152.—B. 612.—1 Show. 317.
¹ T. R. 406.—Vin. Ab. tit. Bills of Exchange, M.—Poth. 405, 712.—2 T. R. 713.—
 pl. 157, 8.—Postlethw. tit. 2 H. B. 610.—Esp. Ca. N. P. 333.
 Bills of Exchange, 16, 17.

^w 1 T. R. 406, 409.—3 T.

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of the maker at the time of such indorsement, cannot, in an action against him as indorser, insist on the want of notice^y. It has also been determined, that though the indorser may have effects in the hands of the drawee, yet if the drawer has none, *he* is not entitled to notice^z. Securities left by the drawer in the hands of the acceptor, for the purpose of his raising money on them, but on which no money has been raised, are not such effects in the hands of the acceptor as to entitle the drawer in any case to insist on the want of notice^a. If, however, the drawer had effects in the hands of the drawee at the time of making the bill, or a valuable consideration passed from the indorser at the time of the transfer, no subsequent occurrence will do away the necessity of notice, although such notice might not, if it had been given, have proved of any service to him. Thus it is said, that the death^b, bankruptcy, or known insolvency of the drawee, are not equivalent to notice, provided the drawee had assets in his hands when the bill was drawn, because many means may remain of obtaining payment, by the assistance of friends or otherwise, of which it is reasonable the drawer should have the opportunity of availing himself^c. Neither will the circumstance of the drawee's having informed the drawer

^y 2 H. B. 336.—Esp. Ca. N. P. 302.

^z Esp. Ca. N. P. 515.

^a Id. 516.

^b Poth. pl. 146.

^c Russel v. Langstaff, Doug.

497, 515.—1 T. R. 408.—

2 T. R. 336.—2 H. B. 612.

before

before the bill was accepted, or became due, that he could not honour it, amount to a sufficient legal excuse for not having given notice^d. And in general, the drawer will, as has been before observed, be at liberty to rebut the presumption that he could not have been damnified, raised by the proof of his having no effects in the hands of the drawee, by proving that he has really sustained damage^e.

A neglect to give notice may be excused by other circumstances besides the want of effects. Thus, where the drawer or indorser is a bankrupt at the time acceptance or payment is refused, it is unnecessary to give notice to him or his assignee^f; and it has been adjudged, that the absconding of the drawer will excuse the neglect to advise him^g; and the sudden illness or death of the holder or his agent, would be an excuse for the want of a regular notice to any of the parties, provided it is given as soon as possible after the impediment is removed^h; but the loss of an accepted bill it is said is no excuseⁱ.

It has been already observed, that if the drawer offers a conditional or partial acceptance, the holder must, provided he means to resort to the drawer and indorsers, give notice of such acceptance. It is said, however^j, that where the drawee refuses to accept absolutely, and makes a condi-

^d 2 H. B. 612.—Esp. 332.

^e Esp. Ca. N. P. 516.

^f *Sed quære*, 2 T. R. 713.

^g Poth. pl. 144.

^h *Ex parte Smith*, 3 Bro. 1, acc.

ⁱ Poth. pl. 125.

Cook's Bkpt. Laws, 168, *semb.*

^j Bayl. 71.

contra.

tional

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tional acceptance, the terms of which are complied with, no notice of the manner in which the bill has been accepted is necessary. And where the drawee undertakes by his acceptance to pay only part of the bill, the parties to the bill are bound to the extent of his acceptance, and an omission to give notice of such partial acceptance, does not discharge them from the obligation to that amount.

2dly, Of the mode in which notice should be given; and of the protest for non-acceptance.

The mode of giving notice of the dishonour of a foreign bill, differs materially from that which the holder must pursue in case of the dishonour of an inland one. In the case of a *foreign* bill, whenever notice is requisite, a *protest* must be made: if, therefore, the person to whom a foreign bill is addressed, will not accept it on presentment, it is in general incumbent on the holder, or some friend, if he is ill, or absent^k, to have it protested, for which purpose he should carry the bill to a *notary*, who is to present it to the drawee, and again demand acceptance; and if he then refuses, the notary is there to make a minute on the bill itself, consisting of his initials, the month, the day, and year, and the reason, if assigned, for non-acceptance; together with his charges for making his minute. The next step which the notary pursues, is to draw up a solemn declaration on the bill itself, if it can be had; and if otherwise, on a copy^l, that it has

^k Mol. b. 2, c. 10, s. 17.

^l 1 Show. 164.

been presented for acceptance, which was refused, and that the holder intends to recover all damages which he or his principal, or any other, may sustain on account of the non-acceptance^m. The minute is usually termed the *noting* of the bill, and the solemn declaration, the *protest*; and to this protest all foreign courts give creditⁿ. The noting is unknown in the law, as distinguished from the protest, it is merely a preliminary step to it; and though it has grown into practice within these few years, it will not in any case supply the place of it^o. The demand is the material thing which must be made by a notary public, to whom credit is given because he is a public officer; and it cannot be made by his clerk^p. The protest, though mere matter of form, is by the custom of merchants indispensably requisite, wherever notice must be given^q; and, as it is said, is part of the constitution of a foreign bill^r: nor can it be supplied by witnesses, or oath of the party, or any other way. Bills are protested for non-acceptance in this country by a notary public, or in case there is not any such notary, by any substantial person of the place, in the presence of two or more witnesses, between sun-

^m Poth. pl. 134.—Mal. 264.—Mar. 16.

ⁿ Molloy, 281.—Skin. 272, pl. 1.—2 Bac. Ab. new edit. 725.

^o 2 T. R. 713.—4 T. R. 175.—Bul. N. P. 271.

^p 4 T. R. 175.

^q Ld. Raym. 993.—6 Mod. 8.—1 Salk. 131.—Goostrey v. Mead, Bul. N. P. 271.—2 T. R. 713.—5 T. R. 239.

^r Holt, 121.

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rise and sun-set. It should in general be made in the place where acceptance is refused; but where a bill is drawn abroad, directed to the drawee at Southampton, or any other place, requesting him to pay the payee in London, the protest for non-acceptance may be made either at Southampton or in London^o. The form of the protest must always be conformable to the custom of the country where it is made¹. A copy of the bill must be prefixed to all protests, with the indorsements transcribed verbatim, with an account of the reasons given by the party why he does not honour the bill². Protests made in this country must, in order to their being received in evidence, be written on paper stamped with a *two shilling* stamp³. It is said, that the making the protest alone is not sufficient, and that a copy of it, or some other memorial, must within a reasonable time be sent with a letter of advice to the persons on whom the holder means to call for payment⁴; but it has been recently adjudged, that it is not necessary that a copy of the protest should accompany the notice of non-acceptance⁵; nor is it necessary to send the protested bill⁶; but a notice of the protest should in all cases be given⁷.

^o Mar. 107.

¹ Poth. pl. 155.

² Poth. pl. 135.

³ 37 Geo. III. c. 90.

⁴ Bayl. 73.—Poth. pl. 148.

⁵ Esp. Ca. N. P. 511, 512.

—Bul. N. P. 271.

⁶ Mar. 68, 86, 87, 120.—

Low. 100.

⁷ 12 Mod. 309.—Ventr. 45.

On a refusal to accept an *inland* bill, no protest is required, any act signifying the refusal of the drawee, being sufficient^a; it has indeed been said in the course of argument, that it is not enough to state in the notice, that the drawee refuses to honour, but that it must go farther, and express that the holder does not intend to give credit to the drawee^b. But with deference it is presumed, that the only reason why notice is required, is, that the drawer or indorsers may have the earliest opportunity of resorting to the parties liable to them, and that therefore it is not necessary that they should be informed that the holder looks to them for payment; for that being a legal consequence of the default of acceptance, they must necessarily be apprized of it by mere notice of non-acceptance, which the holder would not give, unless he intended to demand payment of them^c. At common law, no inland bill could be protested for non-acceptance; but by the statute 3d and 4th Ann, c. 9, s. 4, which will be observed upon more fully hereafter, a protest was given, in case of refusal to accept in writing any bill amounting to the sum of five pounds, expressed to be given for value received, and payable at days, weeks, or months after date, in the same manner as in the case of foreign bills of exchange,

^a 6 Mod. 80.—1 Salk. 131.
—3 Salk. 69.—Ld. Raym. 992.

^b In *Tindal v. Brown*, 1 T. R. 169.

^c *Shaw v. Croft*, cor. Lord Kenyon, Sittings after Trin. T. 1798. MSS. vid. post. tit. "By whom notice must be given."

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for which protest two shillings only are to be paid; This protest must be made, in order to entitle the holder to demand of the drawer costs, damages, and interest^d. If, however, the bill is of the above description; and under the amount of twenty pounds; it may be doubtful whether the holder would not be entitled to the above accumulative remedy, though no protest was made^e. This protest is directed to be made by such persons as are appointed by 9th and 10th William III. c. 17; to protest inland bills for non-payment^f, namely, by a notary public; and in default of him; by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses: within fourteen days of the making of this protest; the same must be sent, or other notice thereof must be given to, or left in writing at the usual place of abode of the party from whom the bill was received^g. The protest for non-acceptance in the case of an inland bill; being, as has been already observed, merely the means of entitling the holder to an accumulative remedy for interest, damages, &c. and the want of it not destroying the holder's right to the principal sum, as it would in the case of a foreign bill, it need not be made; and, as it is said, is in point of practice very seldom made; the bill being in general only *noted* for non-acceptance, and if not paid when due, it is

^d 2 Stra. 910.^f Stat. 3 and 4 Ann. c. 9,^e Stat. 9 and 10 Wm. III. s. 6.

c. 17, s. 6.

^g Id section 5.

then

then protested only for non-payment^h: but notice must be given of the non-acceptance, otherwise the holder takes the risk upon himself. With respect to what is a sufficient notice, it seems that both in the case of a foreign and an inland bill, sending notice by the post is sufficient, even though the letter should miscarry, for it would be very unreasonable to make it incumbent on the holder to send a person with the notice, where perhaps the distance may be very greatⁱ. Where there is no post, it is sufficient to send it by the ordinary mode of conveyance, though it may not be the earliest^j.

There does not appear to be any adjudication with respect to the *time* when a *protest* must be made for the non-acceptance of a *foreign* bill; but from analogy with the time when a protest must be made for non-payment, it should seem that in this country it should be made within the usual hours of business^k, on the day when acceptance is refused^l, and that the neglect to make it at that time will only be excused by inevitable accident, such as sudden illness of the holder, robbery, or other circumstances^m. It is said, however, that it is sufficient to *note* a bill for non-acceptance on the day of refusal, and that the protest may be drawn any

^{3dly}, The time when protest must be made, and notice given.

^h Stat. 3 and 4 Ann, c. 9, s. 5.—Kyd, 150.

ⁱ 2 H. B. 509, *acc.* Barnard Rep. B. R. 199.—Poth. pl. 148, *contra*.

^j 2 H. B. 565.

^k Mar. 112.

^l 4 T. R. 174.

^m Poth. pl. 144.

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day after by the notary; and be dated of the day the noting was made^a. Notice of non-acceptance; and of the protest, must be *sent* to the parties to whom the holder means to resort, within a *reasonable time* after protest made^b; and the holder must not delay the giving notice till the bill is protested, also for non-payment^c. It has long been the subject matter of controversy, whether it is the province of the court or of the jury, to decide what is a reasonable time for this purpose^d; but it is said that what is a reasonable time for protest and notice, is partly a question of fact and partly a question of law, depending in some measure on facts, such as the distance at which the persons live from each other, the course of the post, &c: but that when those facts are established, the reasonableness of the time becomes a question of law, and consequently to be determined by the court, and not the jury^e. It was once thought, that it would be sufficient to charge the drawer, if notice of the dishonour of a bill were given to him at the end of two months, provided he had not in the interim sustained any particular damage by the delay^f; but it is now well established, that it should be given on the day of the refusal to accept, if any post or ordinary conveyance sets

^a Goostrey and Mead, Bul. N. P. 271.

^b 2 H. B. 569.

^c Bul. N. P. 271.

^d Vid. 1 T. R. 168.

^e Per Ld. Mansfield Ch. J.

and Buller J. in Tindal v. Brown, 1 T. R. 168, *acc.* Doug. 514, *contra*.

^f 1 Mod. 27.—Comb. 152;

—Show. 318.—12 Mod. 15.

out that day'; and if not, by the next earliest ordinary conveyance". With respect to inland bills, not protested for non-acceptance, notice of the refusal to accept should in all cases be given within a reasonable time. It should seem that to such parties as reside in the place where the bill was dishonoured, notice should be given if possible the same day; and to parties resident out of that place, by that day's post. Where an inland bill is protested for non-acceptance, if the protest or notice thereof is not sent within fourteen days after it is made, the drawer or indorser will not be liable to damages, &c. under the 3d and 4th Ann, c. 9, s. 5.

The reason why protest and notice are required, is merely that the parties from whom the holder received the bill, may immediately call on those who are liable to them for an indemnity; we may therefore infer, that it would be perfectly immaterial from whom the notice of non-acceptance is received, provided it be brought home to the knowledge of the party entitled to insist on the want of it. It has indeed been said in the course of argument, that the purpose of giving notice is not merely that the drawer or indorser should know that the bill is dishonoured, but that they should likewise be informed whether or not the holder looks to them for payment; and that therefore, although there is no prescribed form of

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4thly, By whom notice must be given.

* 4 T. R. 174.—Ld. Raym.
743.—2 Stra. 829.—Mar. 97.

" 2 H. B. 565.

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notice, yet it must import that the holder looks on the drawer and indorser as liable, and expects payment from them^v; the consequence of which doctrine would be, that the notice, where necessary, must in all cases come from the holder^w. But in a late *nisi prius* case, Lord Kenyon decided, that it is immaterial who informs the drawer of the non-acceptance or dishonour of the bill, because notice is required merely that he may have recourse to the acceptor^x. It is observed, that a notice from the holder, or any other person who may have a right of action upon the bill, may perhaps enure to the benefit of all the antecedent parties, and make a further notice from any of those parties unnecessary. But it is advisable for each party, immediately upon the receipt of notice, to give a fresh one to such of those persons who are liable over to him, and against whom he must prove notice^y.

5thly, To
whom notice
must be given.

The notice of non-acceptance, when necessary, must be given to all the parties to whom the holder of the bill means to resort for payment; and though proof that the drawer had no effects

^v 1 T. R. 170, *et ante* 93.

^w Bayl. 71.—Kyd, 125.

^x *Shaw v. Croft, cor. Lord Kenyon, Sittings after Trinity Term, 1798.*—Assumpsit by the holder of a bill against the drawer.—Defence; no regular notice of dishonour; but it being proved that a message had been left at the

drawer's house by the acceptor, stating that the bill had been dishonoured, Lord Kenyon said, that it made no difference who apprized the drawer, since the end of the notice was, that he might have recourse to the acceptor.

^y Bayl. 83.

in the hands of the acceptor, will be an excuse for want of notice with respect to him, it will not have such operation with respect to any of the indorsers; for they have nothing to do with the accounts between the drawer and the drawee^a.

Where the party entitled to notice is abroad at the time of the dishonour, if he has a place of residence in England, it will be sufficient to leave notice of non-acceptance at that place, and a demand of payment from his wife, or servant, would in such case be regular^a. It was once thought, that notice of non-acceptance must in all cases be given to the drawer of a bill, and demand made on him of payment, or that in default thereof, the indorsers would be discharged, notwithstanding they had regular notice. This opinion, however, so far as it related to foreign bills, was exploded in the case of *Bromley v. Frazier*^b; and in its relation to inland bills, in the case of *Heylyn and others against Adamson*^c, on the principle, that to require a demand of the drawee, would be laying such a clog upon bills, as would deter every body from taking them, since the drawer may perhaps live abroad; besides, the acceptor is the original debtor, and as the act of indorsing a bill is equivalent to making a new bill, the indorser thereby undertakes as well as the drawer, that the drawee shall honour the bill, and the holder may conse-

^a 1 T. R. 712. — Peake, 202.

^a Esp. Ca. N. P. 511, 512.

^b 1 Stra. 441.

^c 2 Burr. 669.

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quently immediately resort to him, without calling on any of the other parties. With respect to inland bills protested for non-acceptance, the 3d and 4th Ann, c. 9, directs the protest or notice thereof to be given to the person from whom the bill was received^d. The observation in the latter part of the preceding paragraph, relative to notice from the holder enuring to the benefit of all the antecedent parties, applies to this case.

6thly, Of the liability of the parties to a bill, on the dishonour of it by the drawee.

The liability of the various parties to a bill, on the dishonour of it by the drawee, may in a great measure be collected from the previous pages. If the drawee, on presentment for acceptance, dishonours the bill, the holder may insist on immediate payment by the parties liable to him, or in default thereof, may instantly commence an action against them^e, on which principle it was determined, that if a man draws a bill, and commits an act of bankruptcy, and afterwards the bill is returned for non-acceptance, the debt is contracted before the act of bankruptcy, and may be proved under the commission, which could not have been the case, if the time when notice of non-acceptance was given had been considered as the period when the debt was contracted^f. So likewise, where the defendant, having been arrested, gave the plaintiff a draft for part of the money due, on which he was discharged out of custody, but the

^d Et vid. Burr. 674.

^e Milford v. Mayor, Doug. 17.

54.—Bul. N.P. 269, *ante* 64.

^f 2 Stra. 949.—3 Wils. 16,

draft having been dishonoured, he was re-taken upon the same writ, it was decided that the proceedings were regular, and justifiable, and Lord Kenyon said, that in cases of this kind, if the bill which is given in payment does not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given^a. With respect to the sum which the drawer and indorsers are bound to pay, they are, as we have before seen, liable where a bill has been protested, not only to the payment of the principal sum, but likewise to damages, interest, &c.^b.

If the holder of a bill has neglected to present it for acceptance when necessary, or to give notice of non-acceptance to those persons entitled to insist on the want of it, such conduct, as it has been previously shewn, will have the effect of discharging them from their respective obligations: however, the consequence of a neglect to give notice of non-acceptance may be done away by some subsequent circumstance, as by some act of the person entitled to insist on the want of it, which amounts to a waiver of the advantage which the law has given him, or in case of a conditional acceptance, by the completion of those conditions before the bill becomes

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7thly, How the consequences of a neglect to give notice may be waived, or otherwise done away.

^a 6 T. R. 52.

and 4 Ann, c. 9, *et post* of the

^b 8 and 9 Wm. III. and 3 verdict and damages.

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payable¹. Thus it has been decided, that a payment of part, or a promise to pay the whole, by the person insisting on the want of notice, amounts to a waiver of the consequence of the laches of the holder, and admits the right of the holder to resort to him¹. And the courts favour the right of the holder in these cases, because the objection on the ground of want of notice, is *stricti juris*, and does not always meet the justice of the case. If, however, a promise to pay is made without a knowledge of the *fact*^k of non-acceptance, or, according to a late case¹, of the

¹ Bayl. 71.

¹ Stra. 1246.—2 T.R. 713.
—Anson v. Bayley, Bul. N. P. 276.—Peake, 202.—Whitaker v. Morris, Esp. Ni. Pri.

57.

^k Burd. 2676.—1 T. R. 712.

¹ Chatfield v. Paxton and Co. Sittings after Tr. T. 38 Geo. III. K. B. MSS. The plaintiff gave a bill to the defendants on Luard and Co. The defendants gave time to the acceptors, and they afterwards became insolvent, of both which circumstances the defendants gave the plaintiff notice, and he at their request, in a letter, accepted another bill, which he afterwards paid: and this action was brought to recover back the money paid. Lord Kenyon—"My opinion is against the defendants: it is not only necessary that the plaintiff should know all the facts, but

that he should know the *legal consequence* of them: it seems to me that the plaintiff did not know the legal consequence of them, and that he paid this money under an idea that he might be compelled to pay it. When the defendants granted this indulgence of two months to Luard and Co. they gave it at their own risk.—Where a man, knowing all the facts explicitly, and being under no misapprehension with regard to any of them, nor of the law acting upon them, chuses to pay a sum of money *volenti non fit injuria*, he shall not recover it back again; but the letters of the plaintiff in this case prove directly the contrary, for they are written in a complaining style." Verdict for the plaintiff 200l. and interest from the time of payment. Erskine and Giles for the plaintiff—Gibbs, for the defendants.

legal

legal consequences of the holder's not having given notice, it seems that it will not amount to a waiver: and it has been determined that a drawer or indorser in such case, having actually paid the amount of the bill to the holder, may maintain an action for the recovery of it^m. But as the rule requiring notice of the dishonour of a bill to be given by the holder, is, as has been already observed, *stricti juris*, and does not always meet the justice of the case, it might not perhaps be improper to require proof from the plaintiff, in such an action, of his having actually sustained damages by the want of noticeⁿ.

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WHEN a foreign bill is protested for non-acceptance, the drawee, or any other person, may accept it *supra protest*, which acceptance is so called from the manner in which it is made.

SECT. 4.—Of acceptance *supra protest*.

Thus, in the first place the *drawee*, though he may not chuse to accept on the account of him in whose favour he is advised the bill is drawn, may nevertheless accept for the account and honour of the drawer: or in case he does not chuse to accept on account of the drawer, he may accept for the honour of the indorser; in which latter case he should immediately send the protest on which he made the acceptance to the indorser^o. It is said, that if the holder is dissatis-

1st. By whom it may be made.

^m Chatfield v. Paxton and Bla. Rep. 390.—2 Doug. Co. ante 102, n. l. 637.

ⁿ 2 Bla. Rep. 824.—1 T. ^o Beawes, pl. 33, 34. R. 285.—3 Burr. 1355.—1

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fied with the acceptance *supra protest*, and insists on a simple acceptance, and protests the bill for want of it, the acceptor should renounce the acceptance he had made, and should insist that it be cancelled, otherwise it is said he acts imprudently^p.

Where the drawee will not accept the bill, *any other person* may, after refusal by the drawee^q, and after protest, accept it for the honour of the bill or of the drawer^r, or of any particular indorser^s; and even a bill previously accepted *supra protest*, may, by another individual, be accepted *supra protest* in honour of some particular person^t. No one, however, should accept a bill under protest for non-acceptance for the honour of the drawer, before he has learned from the drawee his reasons for suffering the bill to be protested; but if the acceptance be in honour of an indorser, such enquiry is needless^u.

It is said that the possessor of a bill must receive an acceptance *supra protest*, if offered by a responsible person, it being of no importance to him whether it is accepted simply or under a protest, as the acceptor pays the charges, unless he had orders from the remitter not to admit of such an acceptance^v. But this dictum seems to be erroneous, for it has been adjudged that the holder need not acquiesce in any case^w.

^p Beawes, pl. 37.^q Id pl. 38.^r Mar. 125.—Lutw. 896, 899.—Carth. 129.^s Beawes, pl. 38, 42.^t Beawes, pl. 42.^u Id pl. 46.^v Id pl. 27, 36.^w 12 Mod. 410, *et vid.* Beawes, pl. 37.

The *method of accepting supra protest* is said to be as follows: the acceptor must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honour of the drawer, or indorser, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand thus—"accepted *supra protest*, in honour of *J. B.*"^x, or, as is more usual, "accepts *S. P.*" Such acceptance, however, may be so worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorser; but in such case it must be sent to the latter^y. The holder should always take care to have the bill protested for non-acceptance before the acceptance for honour is made, as otherwise, it is said, the drawer might alledge that he did not draw on the person making the acceptance^z.

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2dly, Of the mode of accepting *supra protest*.

An acceptance *supra protest* is as *obligatory* on the acceptor as if no protest had intervened, it being indifferent to the possessor of a bill for whose account the same is accepted^a. If the acceptance was for the honour of the bill or of the drawer, he is liable to all the indorsees as well as the holder: if in honour of a particular indorser, then to all subsequent indorsers.

3dly, Of the obligation imposed on the acceptor *supra protest*, by his acceptance.

A person accepting a bill *supra protest*, either for the honour of a drawer or of an indorser, although

4thly, Of the right of such acceptor.

^x Beawes, pl. 38.

^y Id pl. 39.

^z Mar. 88, 125, 6, 7.

^a Beawes, pl. 35, 45. —Ld.

Raym. 575.—12 Mod. 410.—

Comyn, 76.—Burr. 1672, 1674.

without

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without his order or knowledge, has, as it is said, his redress and remedy against such person, who must indemnify him from any damage he may have sustained, as if he had acted entirely by his direction^b. He who accepts a bill in honour of the drawer, hath no remedy against any of the indorsers, because he obligeth himself only for the drawer; and he that accepts for the honour of an indorser, can have no advantage from any one subsequent to him for whose honour he accepted; but the indorser for whose honour he accepted, and all that were before him, the drawer included, are obliged to make satisfaction to the acceptor^c.

^b Beawes, pl. 47.—1 T. R. 269, *ed vid. post* of payment *supra* protest.

^c Beawes, pl. 49, 35, 44.—Poth. pl. 113.—Molloy, b. 2, c. 10, s. 24.

CHAPTER FIFTH.

OF THE TRANSFER OF BILLS AND CHECKS.

IT has been already observed, that the transferable quality of bills and checks, is that which principally distinguishes them from almost every other security for, and evidence of, a contract; and that it was on account of this property, and of the consequent utility of bills and checks in mercantile transactions, that they have been peculiarly favoured by our courts of justice. It is therefore a subject well deserving enquiry in the present chapter, *First*, what bills and checks are transferable. *Secondly*, by whom they are transferable. *Thirdly*, at what time. *Fourthly*, the manner in which a transfer may be effected. *Fifthly*, the nature, operation, and obligation of a transfer; and how that obligation may be released or discharged. *Sixthly*, of the consequences of the loss of a bill or check, and what conduct the holder should thereupon pursue. And *Lastly*, of the protest for better security.

With respect to bills payable to a certain person *or order*, or to the order of a certain person, there never seems to have been entertained a doubt respecting their negotiability; and though bills payable to *bearer*, or to a certain person or bearer,

1st, What bills and checks are transferable.

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bearer, were formerly thought not to be negotiable, and considered as mere *choses* in action, because, as it was said in several cases, such instruments contained no authority to assign, so as to enable the assignee to demand payment of the drawee, but merely an indemnity to the drawee in case he should pay him^a; yet it has been since adjudged^b, that the decisions tending to support this doctrine, and the reasoning on which they were founded, were equally erroneous. It is therefore now well established by usage and decisions, that bills payable to order, or to bearer, are equally negotiable from hand to hand *in infinitum*; and that the transfer vests in the assignee a right of action on the instrument assigned, in his own name. But in general, unless these, or some other words empowering the proprietor of a bill to assign it, are inserted therein, it cannot be transferred so as to give the assignee a right of action against any of the parties to the instrument, except the assignor^c; though it may be collected from the cases relative to bills payable to fictitious persons^d, that any words in the bill, or extraneous facts, from whence it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that per-

^a 3 Lev. 299.—1 Salk. 125.

—1 Lord Raym. 180.

^b Burr. 452, 1516.—Bla. Rep. 485.—2 Show. 235.—

2 Bla. Com. 469.

^c 1 Salk. 133, *ante* 48.

^d 3 T. R. 481.—1 H. B. 569, *et ante* 48.

son. And in all cases, though no words authorizing a transfer are to be found in a bill, yet it will always have the same operation against the party making the transfer, as if he had power to assign^e: for the act of indorsing a bill is equivalent to the act of drawing a bill^f; and a transfer by mere delivery, unless in the case of a discount, or where it is otherwise agreed, imposes on the person making it an obligation to his immediate assignee, similar to that created by indorsement. A doubt was once suggested, whether or not a check or draft on a banker was negotiable out of the bills of mortality^g; but it is now settled that this instrument is as negotiable as a bill of exchange^h.

The law having in general already determined when a bill is assignable, and the mode by which the transfer is to be effected, it is the province of a courtⁱ, and not that of a jury, to decide on the negotiability of these instruments, unless in new cases where the law merchant is doubtful, in which circumstances evidence of the custom may be received^j.

With respect to the persons who may transfer a bill, it may be observed, that in general a valid transfer can only be made by the payee, or the person

^{2dly}, Who may transfer a bill or check.

^e Salk. 125, 133.—Show. 125.—Skin. 411.—2 Keb. 303, *et post*.

^f Same cases.—Stra. 478.—*Ld. Raym.* 181.—*Comyn*, 5, *et post*.

^g *Burr.* 1517, *et ante* 16.

^h 7 *T. R.* 423, *et ante* 16.

ⁱ *Burr.* 1224, 1523, 1528.

^j *Burr.* 1216.—1 *Bla. Rep.* 295, *Carwick v. Vickery*, *Doug.* 653, *et ante* 28.

who

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who is *legally interested* in the instrument, or by his agent, and consequently an indorsement by a person of the same name is inoperative, although the person entitled to transfer the instrument was not particularly described in it ^k. The same rule applies to the right of transferring a bill made payable to bearer or to order, and indorsed in blank, if the person to whom it is assigned knows that the person making the transfer had no right to make it. If, however, the assignee has no knowledge of that circumstance, and takes the instrument *bond fide*, such transfer will be as operative, and will convey the same rights, as if it had been made by a person authorized to make it ^l; for it would be a great clog on the negotiability of bills and checks, if the assignee were bound in every instance where there were no suspicious circumstances, to enquire into the right of the persons making the transfer in the instrument. A further instance of the above rule, is the case of a bill made or indorsed to a *feme sole*, who afterwards marries, in which it has been adjudged that the right of transfer vests in her husband, he being by the marriage entitled to all her personal property ^m. So likewise, if a man becomes a *bankrupt*, all his property is vested by the assignment of the commissioners in the assignees, by relation to the act of bankruptcy, so as to defeat all intermediate

^k 4 T.R. 28.—1 H.B. 607.

^m 1 Stra. 516.—3 Wils. 53.

^l Barr. 1516, *et post* of the consequence of the loss of a bill, Sel. Ca. 96.—10 Mod. 246.

acts done by him to dispose of his property; and consequently the right of transfer is in general in them from the time of the act of bankruptcyⁿ; but it has been adjudged, that if a trader delivers a bill for a valuable consideration to another previous to an act of bankruptcy, and forgets to indorse it, he may indorse it after his bankruptcy^o: and the above rule of law having been found extremely inconvenient to trade, it was enacted by the 19 G. II. c. 32, “ That no person who is or shall be really “ and *bonâ fide* a creditor of any bankrupt, for or in “ respect of goods really and *bonâ fide* sold to “ such bankrupt, or for or in respect of any “ bill or bills of exchange really and *bonâ fide* “ drawn, negotiated, or accepted by such bankrupt, in the usual or ordinary course of trade “ and dealing^p, shall be liable to refund or repay to the assignee or assignees of such bankrupt’s estate, any money which, before the “ suing forth of such commission, was really “ and *bonâ fide*, and in the usual and ordinary course of trade and dealing, received by “ such person of any such bankrupt, before such “ time as the person receiving the same shall “ know, understand, or have notice that he is “ become a bankrupt, or that he is in insolvent “ circumstances.”

On the *death* of the holder, the right of transfer devolves to his executor or administrator, in

ⁿ Beawes, 469.—2 H. B. 335.
^p 2 H. B. 334, and cases there cited.

^o Peake, 50.

which

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which case, however, as the transfer is an admission of assets, they would be personally liable in case of a deficiency of the testator's or intestate's estate⁹.

If a bill is made or transferred to several persons, whether in *partnership* or not, the right of transfer is in all collectively, and not in any individually, though with respect to the mode of transfer, the right of several persons when in partnership may be put in force by the indorsement of one partner only, in which case the transfer is considered as made by all the persons entitled to make it¹. In the case of a bill payable to *A. for the use of B.* the right of transfer is only in *A.* because *B.* has only an equitable and not a legal interest².

3dly, The time when a transfer may be made.

Assignments of bills are usually made after acceptance, and before payment; but although the term transfer, like the term acceptance, supposes a pre-existing bill, a transfer, like an acceptance, may in general be made previous to a bill's being complete. Thus it has been adjudged, that if a man indorses his name on a blank stamp, or piece of paper, such an indorsement will operate as a *carte blanche*, or letter of credit, for an indefinite sum, consistent with the stamp, and will bind the indorser for any sum to be paid at any time, which the person to whom he entrusts the instru-

⁹ 3 Wils. 1.—2 Stra. 1260.
—2 Barnes, 137, cites 2 Burr.
1225.—1 T. R. 487.—1 H. B.
622.

¹ *Ante* 28.

² Carth. 5.—2 Ventr. 307.
—Skin. 264.

ment chuses to insert in it': but to give it this effect, the bill must be drawn for the sum of five pounds or upwards".

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There is no legal objection to the validity of a transfer of a bill made subsequent to the time appointed for the payment of it^v; in which case it is said that the indorsement is equivalent to the act of drawing a bill payable at sight^w. But bills under five pounds cannot be indorsed after they are due^x; and there is a material distinction between the operation and effect of a transfer made previously to the time when a bill is due, and one made after that time; in the first case, it is said the transfer carries no suspicion on the face of it, and the assignee receives it on its own intrinsic credit, nor is he bound to enquire into any circumstances existing between the assignor and any of the previous parties to the bill, as he is not affected by them^y. But where a transfer of a bill is made after it is due, whether by indorsement or mere delivery, the case is otherwise, and the assignee takes the instrument subject to all the equitable rights existing between the person from whom he received it, and the antecedent parties to the bill, of which he was aware at the time of the transfer; and as a transfer after a bill is due is out of the common course of dealing, and

^v Russel v. Langstaff, Doug.

^{514.}—1 H. B. 313, 316, 319.

^u 17 Geo. III. c. 30, s. 1.

^v 1 Lord Raym. 571.—1 Show. 163.—1 T. R. 430.

^w 1 Show. 164.

^x 17 Geo. III. c. 30, s. 1.

^y Per Buller J. 3 T. R. 82.

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of itself affords ground for suspicion, it is always left to the jury on the slightest circumstance, to presume that the indorsee was acquainted with the facts rendering the transfer unfair^z. Where the bill on which the action was founded appeared on the face of it to have been noted at the time of indorsement, that circumstance was held sufficient ground for the presumption that the indorsee knew of the impropriety of the transfer^a; and indeed this rule (which is equally applicable to the transfer of a check or bill payable on demand a long time after it is drawn^b), has, with a view to prevent fraudulent assignments, been carried still further; and an opinion has been expressed, that the mere circumstance of a bill being over-due, is sufficient ground for a jury to presume a knowledge of fraud in the assignee^c; but in a late case, it was said that in these circumstances fraud is not to be presumed without further evidence, although that evidence need not amount to demonstration^d. It has been decided^e, that a party to a bill or check, who has himself transferred it to another person after it was due, shall not be at liberty to object, on the ground of a suspicion of fraud, to the payment of it when in the hands of a third person, who must necessarily have also received it

^z 3 T. R. 83.

^a *Id* *ibid*.

^b 7 T. R. 423.

^c 3 T. R. 83.

^d In *Castle v. Davies*, cor. Lord Kenyon, *Sittings G. H.* 16 Feb. 1796; *et vid.* 3 T. R. 83.—1 Wils. 230.
^e 7 T. R. 430.

after

after it was due ; for it is obvious, payment could not have been demanded when the instrument was due, as it was not then issued ; and the difficulty was occasioned by the party himself, who so gave to it an improper circulation.

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As by payment the contract of the parties to a bill generally ceases, at least so far as to prevent their being subject to new engagements, an indorsement cannot be made after it, so as to affect any of the parties except the person making it ; and therefore, in an action on a bill at the suit of the indorsee against the acceptor, where it appeared that the drawer had paid the bill, and had afterwards indorsed it to the plaintiff, it was decided that such indorsement could not vest in the plaintiff any right of action against the acceptor^f. But a person not originally party to a bill, by paying it for the honour of the parties to it, acquires a right of action against all those parties^g ; and after a payment of a part only, a bill or check may be indorsed over for the residue^h.

With respect to the mode by which a transfer may be effected, it must be governed by the legal operation of the instrument, and not depend merely upon the words which it containsⁱ. A bill payable to a certain person or bearer, or to

4thly, Of the manner in which a transfer may be effected.

^f 1 H. B. 89.—Bul. N. P. 271, *acc.* Gomez v. Barkley, and Hull v. Pitfield, 1 Wils. 46.—4 T. R. 470.—Poth. pl. 186, *semb. contra.*

^g Esp. 112, *et post.*

^h Lord Raym. 360.—Carth. 466.—12 Mod. 213.—1 Salk. 65.—2 Wils. 262.

ⁱ 1 H. B. 600.

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bearer generally^j, or originally payable to order, and indorsed in blank, is in legal operation assignable either by indorsement or by mere delivery^k. A bill payable to the order of a certain person, to that person or order, or assigns, or to the drawer's order, is in general transferable in the first instance only by indorsement^l, though afterwards it is transferable by delivery, provided the first indorsement was in blank. The transfer by mere delivery^m, of a bill payable to the order of a fictitious payee, is valid against all the parties to it, acquainted with that fact.

There is in general no formal set of words essential to the validity of an indorsement, either when it is intended to convey the property in the instrument to the assignee, or merely to constitute him an agent to receive payment as such for the indorser; it being in both cases sufficient, that the indorser's name be written on the back of the instrumentⁿ, or any other part thereof, by himself or some person duly authorized by him; but the mere circumstance of the payee's putting a number on a bill, will not be equivalent to an indorsement^o. In the case of bills under five pounds, the indorsement must be attested by a subscribing witness, and must mention the name and place of abode of the indorsee, and bear date at or be-

^j Lord Raym. 442.—Holt, 115, 117.—Skin. 332, 346, *semb. contra.*

^k Peacock v. Rhodes, Doug. 633.—Peake, 225.—Esp. 180.

^l 7 Mod. 87.—1 H. B. 606.

^m 1 H. B. 600, *ante* 59, 61.

ⁿ *Vid. post*, note q. 1.—2 Bla. Com. 468.

^o 3 T. R. 757.

fore the making thereof; in short, it must be made in the form prescribed in the schedule to the statute 17 Geo. III. c. 30, s. 1, which regulates these indorsements. Where the residence of the indorser of a bill is not well known in the commercial world, it would be advisable for him in all cases to mention in his indorsement the name of the place where he resides^p.

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Though in general, no particular form is necessary in indorsements, the mode in which they are made either in *blank*, in *full*, or *restrictive*, in all cases governs the assignable property of a bill or check. An indorsement in *blank*, which is by far the most common, is made by the mere writing of the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. It has been adjudged, that such an indorsement does not transfer the property and interest in the bill to the indorsee, without some further act^q; but it gives him, as well as any other person to whom it is afterwards transferred, the power of constituting himself assignee of the beneficial interest in the bill, by filling it up payable to himself (as by writing over the indorser's name "pay the contents"), which he may do at the time of trial^r.

^p Bul. Ni. Pri. 276.

^q 1 Salk. 126, 128, 130.—244.—1 Salk. 127, 130.—1 Show. 163.—Ld. Raym. 443.

12 Mod. 192, 244.—Lord

Comyn, 311.—Barnes, 453.—

Raym. 443.—Vin. Ab. tit.

Vin. Ab. tit. Bills, H. 8.—

Bills, H. 6.—Bul. N. P. 275.

Bul. N. P. 275, 278.

^r 2 Sra, 1103.—12 Mod.

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If the indorsee fills up the blank indorsement, and makes it payable to himself, the action cannot be brought in the name of the indorser, which otherwise it may be*. A blank indorsement makes a bill transferable by the indorsee by mere delivery†, and its negotiability by that method cannot be restrained by any subsequent indorsement in full, because a holder, by delivery, may consider himself as the indorsee of the payee, and strike out all the subsequent indorsements, whether special or not". Such being the operation of an indorsement in blank, it is advisable for the indorsee to fill it up so as to make it an indorsement in full as soon as possible, in order to avoid the risk which he may run in case the bill is lost, of its getting into the hands of a *bonâ fide* holder‡.

An indorsement in *full*, is so called because the indorser expresses therein in whose favour he makes the indorsement, as, "pay the contents to Mr. *A. B.*" This indorsement, as it is said, contains in itself a transfer of the interest in the bill to the person named in the indorsement", and makes the bill transferable in the first instance by the indorsement of *A. B.* only*; though afterwards, if *A. B.* makes a blank indorsement, it is

* 12 Mod. 193, 244.—1 Salk. 125, b. S. C.—Mar. 123, 4.—1 Show. 163.—2 Stra. 1103.
† Peacock v. Rhodes, Doug. 633.

" Peake, 225.—Esp. N. P. 180, S. C.

‡ Beawes, pl. 178.

§ Poth. pl. 22, 23, 24.

* 4 T. R. 28.

transferable by delivery as well as by indorsement. PART I.
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As the negotiability of a bill originally transferable, can only be restrained by express words to that effect, the words "or order" need not be inserted in a full indorsement, to give the bill a subsequent negotiable quality^y.

The payee and indorsee having the absolute property of the bill, and the right of disposing thereof, has the power of limiting the payment to whom he pleases^z, and consequently he may make a *restrictive* indorsement. Thus he may stop the currency of the bill, by giving a bare authority to receive the money, as by an indorsement requesting the drawee to "pay to A. for my use," which mode prevents a blank indorsement from being filled up by the indorsee, so as to convey any interest in the bill to himself^a; and, as it is said, is revocable in its nature like a power of attorney^b. It was once thought, that although the indorser might make a restrictive indorsement, when he intended only to give a bare authority to his agent to receive payment, he could not, where the indorsement was intended to transfer the interest in the bill to the indorsee, by any act preclude him from assigning it over to another person, because, as was said, the assignee purchases it for a valuable consideration, and therefore takes it

^y Comyn, 311.—Bla. Rep. 295.—Burr. 1216.—Stra. 557. Bul. N. P. 275.—Acheson v. Fountain, Sel. Ca. 126.

^z Burr, 1218,

^a Burr. 1227.—Bla. Rep. 299.—1 Atk. 249.—1 Show. 163.—Poth. pl. 89, 90.

^b Poth. pl. 168.—Mar. 72, acc. Beawes, pl. 219, *contra*.

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with all its privileges, qualities, and advantages, the chief of which is its negotiability^c. It has, however, long been settled on the above principle, that any indorser may restrain the negotiability of a bill, by using express words to that effect, as by indorsing it "payable to J. S. only;" or by indorsing it, "the within must be credited to J. S."^d; or by any other words clearly demonstrating his intentions to make a restrictive and limited indorsement; but a mere omission in the indorsement, as leaving out the words "or order," will not in any case prevent a bill being negotiable *ad infinitum*^e.

It is here necessary to observe, that although an indorsement may be made in blank, in full, or restrictive, it cannot after acceptance be made for less than the full sum appearing to be due upon the bill or instrument transferred^f, because a personal contract cannot be apportioned; and it would be making the acceptor liable to two actions, when, by the contract raised by his acceptance, he subjects himself only to one action; but where a bill is indorsed, before acceptance, for part of the sum for which it is drawn, the acceptor may, by his acceptance after this indorsement, become liable to two actions^g; and there is no

^c Burr. 1226.

^d Archer v. Bank of England, Doug. 637.

^e Burr. 1216.—Bla. Rep. 295.—Comyn, 311.—Stra.

557.—Bul. N. P. 275.—Sel. Ca. 126.

^f Lord Raym. 360. Carth. 466.—12 Mod. 213.—Salk. 65.

^g Beawes, pl. 266.

doubt,

doubt, that where the drawer of a bill has paid part, it may be indorsed over for the residue^h. PART I.
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Upon a transfer, whether by indorsement or bare delivery, the bill must of course be *delivered* to the assignee; and in all cases of a transfer of a bill drawn in sets, each part must be delivered to the person in whose favour the transfer is made, otherwise, the same inconveniences may follow, which, as we have before seen, may arise upon a neglect to deliver each of them to the payee.

The operation and nature of a transfer, the right which it vests in the assignee, and the obligation which it imposes on the assignor, may in a great measure be collected from what has previously been said.—A transfer of a bill of exchange by indorsement, is an act similar in its effects to that of making a new bill, the indorser being in almost every respect considered as a new drawer on the original draweeⁱ, on which principle it is said to have been decided, that a promissory note indorsed may be declared on as a bill of exchange^j. A transfer by indorsement or delivery, where it may be made, vests in the assignee a right of action on the bill against all the precedent parties to it; but a transfer by indorsement, where it is necessary, will convey no title against

^hthly, Of the operation and nature of a transfer; the right which it vests in the assignee; and the obligation which it imposes on the person making it; and how that obligation may be discharged.

^h 2 Wils. 262.—1 Salk. 65. Holt, 115.—Skin. 255, 342, 411.—1 Atk. 282.—2 Atk. 182.
—Lord Raym. 360.—Carth. 466.—12 Mod. 213.
ⁱ Stra. 478.—1 Salk. 133.
—3 Salk. 68.—2 Show. 441, 495, 501.—2 Burr. 674.—
^j 4 T. R. 149, cites 6 Mod. 29, 30.

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any other person than the indorser, unless it is made by him who has a right to make it. In this respect, such a transfer differs from that by delivery, which, if the assignee took the instrument fairly and *bond fide*, will vest in him all the rights, privileges and advantages which can in any case be acquired under it^k.

As the act of *indorsing* is similar to that of drawing, the obligation which it imposes on the indorser to the indorsee, and the mode in which that obligation may be extinguished, by the holder's laches or otherwise, is in all cases exactly similar to that which a drawer of a bill is under to the payee^l. The indorser is, however, under no obligation in any case to the acceptor, unless indeed in the case of an acceptance for his honour^m. An indorsement also imposes the same obligation on the person making it, although the bill contain no assignable wordsⁿ.

A transfer by *delivery*, without any indorsement, when made on account of an antecedent or pre-existing debt, or for a valuable consideration passing to the assignor at the time of the assignment, as where goods are sold to him^o, imposes an obligation on the person making it to the per-

^k Lord Raym. 738.—Burr. 452, 1516. — Peacock v. Rhodes, Doug. 611, 633.

^l Ld. Raym. 738.—Burr. 452, 1516. — Peacock v. Rhodes, Doug. 611, 633.—Holt, 117.

^m Poth. pl. 111, 112.

ⁿ Salk. 127, 132.—Burr. 1226.—Holt, 117.

^o 7 T. R. 64.—Ld. Raym. 928.—12 Mod. 244, 408.—6 T. R. 52.

son in whose favour it is made, similar to that of a transfer by indorsement^p; a distinction was indeed once taken between the case of a transfer of a bill or check for a precedent debt, and that of a transfer for a debt arising at the time of the transfer, and it was held that if *A.* bought goods of *B.* and at the same time gave him a draft on a banker, which *B.* took without any objection, it would amount to payment by *A.*, and *B.* could not resort to him in the event of the failure of the banker^q; but it is now settled, that in such case, unless it was expressly agreed at the time of the transfer, that the assignee should take the instrument assigned, as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee, maintain an action against the assignor, on the consideration of the transfer^r. But, as on a transfer by delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, becoming such after the assignment by himself, and consequently no person but his immediate assignee can maintain an action against him^s. When a transfer by delivery without indorsement is made merely by way of *sale* of the bill, as in the case of a discount^t, or where the

^p Lord Raym. 928.—12 Mod. 408, 521.—1 Stra. 415, 416, *semb. contra.*—12 Mod. 517.
^q 12 Mod. 203, 408, 517.
^r 7 T. R. 65, 66.—Holt, 121.
^s Lord Raym. 928.
^t 3 T. R. 757.—Esp. Ca. N. P. 447.
¹ 1 Salk. 124.—3 Salk. 68.—Holt, 298, 9, *et post.*

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assignee expressly agrees to take it in payment, and to run all risks^v, he has in general no right of action whatever against the assignor, in case the bill turns out to be of no value : but there can be no doubt, that if a man were to assign a bill for any good consideration, knowing it to be of no value, he would in all cases be compellable to repay the money he had received^v.

The obligation of the assignor, though it is in general irrevocable, may, as has been already observed, be discharged or released by the act of the holder, in the same manner as the obligation of the drawer may be : it may also be discharged by payment of the bill by any other person^w ; but the taking of any of the parties in execution, will only discharge that person, and will not operate in favour of any other^x.

6thly, Of the consequences of the loss of a bill or check; and what conduct the holder thereof should thereupon pursue.

If the *holder* of a foreign or inland bill of exchange, or check, transferable by *mere delivery*, *loses* or is *robbed* of it whilst in his possession, and it gets into the hands of a person who was not aware of the loss, for a good consideration, previously to its being due^y, such person, notwithstanding he derived his interest in the instrument from the person who found or stole it, may maintain an action against the acceptor or other parties to the

^v 7 T. R. 65, 6.—Cooke's Bkpt. L. 120.

^w 12 Mod. 517.—3 T. R. 759.—Holt, 121.

^x 1 Wils. 46, *et ante* 115.

^y 2 Bla. Rep. 1235.—4 T. R. 825.—2 Show. 481, *et post*.

^z Good v. Coe, cited 7 T. R. 427, *et ante* 113, 4.

instrument²; and the original holder who lost it will consequently forfeit all right of action; for it may be laid down as a general principle, that wherever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss, must sustain it³. If therefore a person, not having given a consideration for a lost or stolen bill or check, transferable by mere delivery, in which case, as it has been well observed, possession proves property, presents it to the drawee, and he pays it before he has notice of the loss or robbery, such drawee will not in general be liable to pay it over again to the real owner^b. Where a banker paid a check the day before it bore date, which had been lost by the payee, it was adjudged that he was liable to repay the amount to the loser, it being proved to be contrary to the usual course of business to pay drafts before the day on which they are dated^c. Where a bill is assignable only by *indorsement*, as no interest in it can be conveyed otherwise than by that act, any person getting possession of it by a forged indorsement will not acquire any interest in it, although he was not aware of the forgery; and consequently the original holder in such case may recover against the acceptor and drawer, al-

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² Ld. Raym. 738.—1 Salk. 126.—3 Salk. 71.—9 Mod. 47.—Burr. 452, 1516.—Peacock v. Rhodes, Doug. 633.

³ Per Ashhurst J. 2 T. R. 70.

^b Vide note d. *post acc.* Poth. pl. 168, 169, *seimb. contra.*

^c Da Silva v. Fuller, Sirtings London, East. 1776, Esp. N. P. 40, *et post.*

though

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though the acceptor may have paid the bill; and if the person attempting to derive an interest under such indorsement, sues the acceptor, he will be admitted to prove that the indorsement was not made by the person entitled to make it^d.

^d 4 T. R. 28. — 1 T. R. 607. — Aaron Smith and another, assignees of Bagnall and Hand, v. Shepperd, London, *post.* Hil. T. 16 Geo. III. — Defendant was indebted to Bagnall and Hand in thirty pounds, for goods sold and delivered October 1774. — Comberstall, bankrupts' servant, brought a bill of parcels in same hand writing that all their former bills had been: said his master was in want of cash, and desired he would accept a bill of exchange, which C. immediately drew, signed with his own name, payable to Bagnall and Hand, or order, and gave a receipt on the bill of parcels. Defendant accepted the bill, and C. afterwards carried it away. Bill was brought to defendant by Spencer, who had it in payment for goods. The names of Bagnall and Hand were indorsed on the Bill, and defendant paid it; but that indorsement was a forgery. It was bankrupts' practice to deliver in their bills at Christmas; but at Christmas after this transaction, no bill was delivered to defendant. No evidence appeared whose hand writing the indorsement was, but it did not appear like the bankrupts' or Comberstall's. Lord Mansfield said, "Each

party is innocent: the question is, on whom the loss must fall? — it should be on him who is most in fault. It is admitted that Comberstall used to receive money, but not draw bills. — Here is a bill that does not trust Comberstall at all, for it is to pay to the order of the bankrupts: in this case, if he had been used to draw bills, that would not vary the case, because it is not pretended that the indorsement was by Comberstall: then he that takes a forged bill must abide by the consequence, for the man whose name is forged knows nothing of it. If a bill payable to bearer is lost, and found by another person in the street, who carries it to a banker who drew it, and he pays, it is a good payment, for it is the owner's fault that he lost it. In this case, the name of Bagnall and Hand is forged: it could not be paid without their hand, and defendant has been negligent in inquiries whether it was their hand or not. The ground which defendant relies on is, that the bill was not delivered at Christmas, as usual; but that is of no weight, because it had been delivered before in October." — Verdict for plaintiff.

Hence

Hence it is obvious that the holder of a bill, whether transferable by mere delivery or not, should, in case of loss, immediately give notice of it to the acceptor, and all the antecedent parties^c; and where the bill is transferable by mere delivery, should also give public notice of the loss, in order to prevent any person from taking it^f. It is said by Marius^g, that the holder of the bill which has been lost, should in the presence of a notary and two witnesses, acquaint the acceptor with the loss, and signify to him, that at his peril he pay it to none but himself or his order; and the same writer says, that no person should refuse to pay a bill to the loser, which he has accepted, on the ground of its being lost, if he has sufficient security and indemnification offered to him; and that if he does, he will be liable to make good all losses, re-exchange, and charges^h.

In France, as long ago as the beginning of the last century, the drawer of a bill was compellable to give the holder of it another of the same tenor, in case he lost the original one; but in this country, no such rule holds in the case of inland bills. There is, however, a proviso in the stat. 9 and 10 William III. c. 17, s. 3, in favour of the holder of a bill above five pounds, expressed for value received, and payable after date, who may in case

^c Poth. pl. 132.

^f Beawes, pl. 179.

^g Page 77.

^h Mar. 80.—Beawes, pl.

182, 185.—Tercese v. Geray,
Fin. Rep. 301.—Vin, Ab. tit.
Bills, R.

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of loss, demand of the drawer another bill of the same tenor with the original one, on his giving security, and indemnifying him against all persons whatsoever, in case the lost bill should be found again.

If one part of a foreign bill of exchange drawn in sets, is lost by the drawee, or by his mistake given to a wrong person, or if by any other means the holder cannot have a return of his bill, either accepted or non-accepted, the drawee must give to the holder or to his order, a promissory note for payment of the amount of the bill on the day it becomes due, on delivery of the second part, if it arrives in time; or if not, upon the note, which in all cases is to have the law and privilege of a bill of exchange; and if the acceptor refuses to give the note, the holder must immediately protest for non-acceptance, and when due, must demand the money, though he has neither note nor bill, which, if refused, a protest must be regularly made for non-payment¹. In all cases, if a bill of exchange be lost, and a new bill cannot be had of the drawer, a protest may be made on a copy¹.

Lastly, Of
the protest
for better se-
curity.

The custom of merchants is stated to be, that if the drawee of a bill of exchange absconds before the day when the bill is due, the holder may *protest* it in case of refusal by the drawee to give security to pay it, to have *better security* for the payment of the remitter, and to give

¹ Beawes, pl. 188.—Mar. 121.—Bul. N. P. 271.

¹ 1 Show. 163, *ante* 89, 90.

notice

notice to the drawer of the absconding of the drawee^k. This security, it is said, is usually given by making another subscription under the protest, that the person who becomes new security will be bound as principal for the payment of the sum mentioned in the bill upon which the protest is made^l.

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^k Lord Raym. 743.—Mar. 27, 111, 112.—Beawes, pl. 22, 24, 26, 27, 29. ^l Com. Dig. tit. Merchant, F. 8, cites Mar. 28.

CHAPTER SIXTH.

OF PRESENTMENT OF A BILL OR CHECK FOR
PAYMENT—OF PAYMENT—OF THE CONDUCT
WHICH THE HOLDER MUST PURSUE ON NON-
PAYMENT; AND OF PAYMENT SUPRA PRO-
TEST.

Sect. 1.—Of
presentment
for payment;
and, 1st,
when it is
necessary.

IT would be extremely prejudicial to commerce, if the holder of a bill or check were suffered to give longer credit to the drawee than the instrument directs, and afterwards, in default of payment by such drawee, to resort to the drawer or indorsers, at a time when perhaps the accounts between them and the persons liable to them might be adjusted, or those persons may have become insolvent^a. On this principle it has been repeatedly adjudged, that the holder of a bill must present it to the drawee for payment at the time when due, where a time of payment is specified; or where no time is expressed, within a reasonable period after receipt of the instrument^b; and that if he neglects to do so, he shall not afterwards resort to the drawer or indorsers, whose contracts are collateral only to pay in default of payment by the drawee, and not immediate or

^a 1 Salk. 127.—Stra. 1087.
Bul. N. P. 470.—2 Bla. Com. 470.

^b Poth. pl. 129.—7 T. R. 581, 2.

absolute, and who are always presumed to have sustained damage by the holder's laches^c. PART I.
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It appears that a distinction was formerly taken between the case of a bill of exchange given in payment of a precedent debt, and that of one given for a debt contracted at the time the bill was given: in the latter case, it was always held that the person who received it must have used due diligence to obtain the money from the drawee, and that in default of his so doing, he could not support any action against the party from whom he received it; but in the former case, the bill was not considered as payment, unless the money was actually paid by the drawee, although the holder might have neglected to present it for payment, or to give notice of non-payment; and the holder, though he could not sue on the bill, might maintain an action for the consideration on which it was given^d. This distinction, founded it is presumed on the principle that a bill delivered in consideration of a precedent debt, could only be understood as a collateral security, which the assignee might waive, no longer exists^e. It has been held, that even the death

of

^c 2 Burr. 669.—7 T. R. 581, 2. *acc. Rep.* T. Hardw. 295, *semb. contra.*

^d 12 Mod. 203, 408.—Holt, 299.—1 Salk. 124.—*Trials per pais*, 499.—Kyd, 171.

^e Bul. N. P. 182.—It seems to be the opinion of a modern

writer on the subject of bills (Kyd, 172), that the statute 3 and 4 Ann, c. 9, s. 17, put an end to this distinction; but the clause to which he appeals in support of that opinion, relates only to *such bills as are referred to in the 4th section*

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of the acceptor will not excuse the neglect to make presentment, but that in such case it should be made to his personal representative; and in case there is no executor or administrator, then at the house of the deceased^f. If the holder of a bill at the time it becomes due, is dead, it is said that his executor, although he has not proved the will, must present it to the drawee^g. Where a bill, transferable only by indorsement, is delivered to a person without being indorsed, he should even in that case demand payment of the acceptor, and offer an indemnity to him; and if the acceptor then refuses to pay, the bill should be protested for non-payment^h. This general rule which requires presentment for payment, is subject to several exceptions, and the neglect to make a proper presentment, may be excused by circumstances similar to those which have been decided to render it unnecessary to give notice of non-acceptance; as where the drawee has had no effects of the drawer in his hands from the time of drawing the bill to the time when it is due; and in all cases, the right to insist on the neglect to present, as a defence, may be waived by some

of the act, namely, bills made payable after date, and expressed to have been given for value received; and the 7th clause also, only takes away the accumulative remedy given by the statute 9 and 10 Will. III. c. 17, and 3 and 4 Ann. c. 9. It is therefore probable

that this alteration is rather to be ascribed to the change of opinion in our courts of justice.

^f Poth. pl. 146.—Molloy, b. 2, c. 10, s. 34.—Mar. 134.

^g Mar. 135.

^h Id *ibid*.

act

act of the person entitled to such right, as by <sup>PART I.
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ⁱ Stra. 1246.^j *Ante* 102.^k *Dingwall v. Dunster*, Doug. 235, 247.—Esp. N. P. 46.—*Anderson v. Cleeland*, G. H. *post. Pas.* 1769. Esp. N. P. 46.^l 10 Mod. 38.—*Smith v. De la Fontaine*, Bayl. 78, n. b. 108, n. a.—*Prac. Reg.* 358.^m 1 Stra. 222, *arg.*—1 Saund. 33.—*Poth. pl.* 140.—*Mar.* 98.ⁿ *Poth. pl.* 174.

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If the acceptor undertakes by his acceptance to pay within a certain period after demand, he may insist on the want of presentment^o; and where he appoints the payment to be made by another person, as at his banker's, he, as well as every indorser, is *primâ facie* entitled to insist on the want of a proper presentment to such person^p; but such *primâ facie* evidence may be rebutted by proof of the want of effects in the hands of such banker^q.

adly, By,
and to
whom, pre-
sentment for
payment
must be
made

Presentment for payment, where necessary, must be made by the holder of the instrument, or his agent, being competent to give a legal acquittal on receipt of the money^r, to the person in general on whom it is drawn^s; and a person in possession of a bill payable to his own order, is a holder for this purpose, though it was once thought he had only an authority to indorse^t. It is not necessary that the demand should be personal, it being sufficient if it is made at the house of the acceptor^u; and it is the same thing in effect, if it be made at the place appointed by him for payment^v, or of his agent who has been used to pay money for him^w. Therefore, where a bill is either made or accepted payable at a particular place, or by a particular person not party to the instrument, the presentment for and demand of

^o 2 Show. 235.

^p Stra. 1195. — Bayl. 78,
acc. Smith v. De la Fontaine,
Bayl. 78, n. a. contra.

^q Bayl. 78.

^r Esp. 115.

^s Poth. pl. 129.

^t 10 Mod. 286, et ante 15.

^u Esp. 512.

^v 2 H. B. 509.

^w 12 Mod. 241.

payment

payment should be made at such place, or on such person ^x; and in default thereof, the acceptor and other parties would in general be discharged from their obligations. If, on the contrary, it is made, and payment is refused, though in general notice must be given, yet it will be unnecessary to make another presentment to the acceptor in person, for the contract and undertaking that there should be cash, and that the bill should be paid there, is broken ^y; and though the person at whose house the instrument is made payable, is not a party to it, and consequently not personally liable, yet an answer by him, or at his house, as to the payment or non-payment of it, is sufficient ^z. In the spirit of this rule it has been decided, that if the person at whose house the instrument is made payable, is himself the holder of it, it is a sufficient demand of payment for him to inspect his books, and sufficient evidence of a refusal, to find upon such inspection that he had no effects in his hands ^a.

It would be so great a hardship, if a trader or other person who has accepted a bill, or is only drawee, should have his credit blasted by the instrument being protested, merely because he had removed from the place in which the bill represented him to reside, that the law considers it as in-

^x 2 H. B. 509.

^y Mar. 106.—2 H. B. 509.

—Com. Dig. tit. Merchant,
F. 7.

^z Esp. 4.

^a 2 H. B. 509.

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cumbent on the holder in such case to use every reasonable endeavour to find out whither he is removed, and in case he succeeds in such attempt, to present it for payment at that place^b. But if the acceptor has absconded, that circumstance will sufficiently excuse the not making any further enquiries after him^c; and if he has left the country on any account, presentment and demand of payment of his wife, or agent, at the place where he formerly resided, would be sufficient^d.

If on presentment, it appears that the drawee is dead, the holder should enquire after his personal representative, and present the bill to him^e; and in case there are no representatives, should demand payment at the house of the deceased^f.

It is only necessary to demand payment of the person on whom the bill is drawn, and it is consequently unnecessary, in case of default of payment, to make any demand on the drawer previous to an action against the indorser^g.

3dly, The time when a bill or check should be presented for payment.

The time when a bill or check ought to be presented for payment, where it is payable at a certain time after it is drawn, as in the case of a bill payable after date, or sight, or at usance, depends on the formation of the instrument itself; and where no such time of payment is expressed, as in the case of bills payable at sight, or on de-

^b Collins v. Butler, Stra. 1087.

^c Lord Raym. 743.

^d Esp. 511, 2.

^e Molloy, b. 2, c. 10, s. 34. — Poth. pl. 146.

^f Poth. pl. 146. — Mar.

134.

^g 2 Burr, 669.

mand,

mand, it is dependent on the local situation of the parties, or other circumstances, necessarily varying in every particular case. It was once thought, that the propriety of a presentment for payment with respect to the time when it should be made, was in all cases a question for the determination of a jury; but the decisions of juries having been found to be very much at variance with each other^h, and consequently to have rendered the commercial law in that respect very uncertain, and the usage of merchants having been long since established, our courts have of late taken upon themselves in all cases to determine the time when a presentment ought to be madeⁱ. Where bills are payable at usance, or a certain time after date or sight, they are not payable at the time mentioned in the bill, or which on the face of it they naturally purport to be, days of grace being allowed^j; but in the case of bills or checks payable at sight, or on demand, no such days are allowed. Before we enter into a particular enquiry when bills and checks payable at usance, after date, after sight, after a particular event, at sight, or on demand, ought to be presented for payment, it may not be improper to make a few

^h 1 Salk. 127.—Stra. 508, Brown v. Collinson, Beawes, 929.—1 Show. 155.—2 Freem. pl. 229.—4 T.R. 148.—Kyd, 247, 257.—1 T. R. 168, 9. 45. acc. Doug. 515.—2 H. B. 568, 9, *contra*.
ⁱ Appleton v. Sweetapple, B. R. M. 23 G. III. Bayl. 65, 4 T. R. 170.—Poth. pl. n. c.—1 T. R. 168, 9, 170.— 14, 15.—Mar. 76.

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observations relative to the mode of computing time in the case of bills in general, and some remarks with respect to the days of grace.

Where a bill is drawn at a place using one style, and payable on a day certain at a place using another, the time when the bill becomes due must be calculated according to the style of the place where it is payable, because the contract raised by the making of a bill of exchange is understood to have been made at that place, and consequently should be construed according to the laws of it^k. And although the general rule of law is, that when computation is to be made *from* an act done, the day in which the act is done must be included^l, the law with respect to bills of exchange is different, for the custom of merchants, as judicially sanctioned, has settled that where a bill is payable at usance, so many days after sight, or from the date, the day of acceptance, or of the date, must be excluded^m, and therefore if a bill drawn payable ten days after sight, is presented on the 1st day of a month, the ten days expire on the 11th, and the bill, by the

^k Bayl. 68.—Poth. pl. 155.—Beawes, pl. 251.—Mar. 102, *ante* 59.—*acc.* Kyd, 8, *contra*.—Old Style still prevails in Muscovy, Denmark, Holstein, Hamburg, Utrecht, Gueldres, East Friesland, Geneva, and in all the Protestant Principalities in Germany, and the Cantons of Swit-

zerland.—Beawes, pl. 258.—Kyd, 7, 8.—Mar. 56.

^l Clayton's case, 2 Vent. 308, 310.—3 T. R. 623.

^m Ld. Raym. 280.—Lutw. 1591.—1 Barnard, B. R. 303.—Poth. pl. 13, 15.—6 T. R. 212.—Beawes, pl. 252.—*acc.* Mayo v. Cooper, Fort. 376, *contra*.

addition of the days of grace, where they are three in number, becomes due on the 14th. Where a bill or check is drawn payable at usance, or a certain time after date, and it is not dated, the time when it is payable must be computed from the day it issued, exclusive thereofⁿ.

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The *days of grace* which are allowed to the drawee, are so called because they were, as it is conceived, formerly merely gratuitous, and not to be claimed by the person on whom it was incumbent to pay the bill, and were dependent entirely on the inclination of the holder. They still retain the name of days of grace, though the custom of merchants, recognized by our courts of justice, has long since reduced them to a certainty, and established a right in the acceptor to them in all cases of bills or notes payable at usance, and after date or sight^o. The number of these days varies according to the custom of different places. The following is a list of the days of grace established by the law merchant in different countries^p:

Great Britain, Ireland, Bergamo, and Vienna,	-	3 days.
Frankfort, out of the fair time,	-	4 do.
Leipsick, Naumberg, and Augsburgh,	-	5 do.

ⁿ Bayl. 68, cites Lord Raym. 1076, ante 43.

^o 4 T. R. 151, 2. — Terme de grace n'est terme de grace que de nom, parce que c'est *humanitatis ratione* qu'elle la accordé, et pour le distinguer de celui porté par la lettre: il est réellement terme de droit, puisque c'est la loi qui

le donne.—Poth. pl. 187. See Coleman v. Sayer, Barnard Rep. B. R. 303.—Vin. Ab. tit. Bills of Exchange, B. 9.—4 T. R. 151, where it is said to have been once decided, that days of grace are not allowable on inland bills.

^p Beawes, pl. 260.—Mar. 94.

Venice,

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Venice, Amsterdam, Rotterdam, Middleburgh,	}	6 days.
Antwerp, Cologn, Breslau, Nuremburg, and		
Portugal, - - - - -		
Naples, - - - - -		8 do.
Dantzick, Koningsburg, and France, - - - - -		10 do.
Hamburgh, and Stockholm, - - - - -		12 do.
Spain, - - - - -		14 do.
Rome, - - - - -		15 do.
Genoa, - - - - -		30 do.
Leghorn and Milan, and some other places in Italy, no fixed time.		

Wherever a bill is drawn payable to the excise, they usually allow six days beyond the three days of grace, if required by the acceptor, on payment of one shilling to the clerk at the expiration of the six days, for his trouble; and in a case where the commissioners of excise, being the payees of such a bill, gave the drawee the above time, Lord Mansfield decided, that as this custom was a general one, ingrafted on such bills, and known universally, the drawer was not discharged by the above indulgence to the drawee^a.

The days of grace which are allowable on a bill of exchange, must always be computed according to the laws and customs of the place where it is due. At Hamburgh, the day on which the bill falls due, makes one of the days of grace; but it is not so elsewhere. In Great Britain, Ireland, France, Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzick, and Koningsburg, Sundays and holi-

^a Welford v. Hankin, G. Hall, Sitt. Hil. 1763, Esp. 59. Poth. pl. 139.

days are always included in the days of grace; but not so at Venice, Cologne, Breslau, and Nuremburg. PART I.
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In this country, if the third day of grace happens to be a Sunday or great holiday, as Christmas-day, upon which no money used to be paid, there the party ought to demand the money upon the second day of grace, and in case it is not then paid, must consider the bill as immediately dishonoured*. In other cases, a presentment before the third day of grace being premature, will be a mere nullity†.

Foreign bills, as has been observed in a previous chapter, are usually drawn payable at one, two, or a greater number of *usances*. The term *usage* is French, and signifies the time which it is the usage and custom of the countries between which bills are drawn, to appoint for payment of them". The length of the *usage*, or time which it includes, varies in different countries, from fourteen days to one, two, or three months after the date of the bill. Double or treble *usage* is double or treble the usual time, and half *usage* is half that time: where it is necessary to divide a month upon an half *usage*, which is the case when the *usage* is either one month or three, the division, notwithstanding the difference in the length of the month, contains fifteen days‡.

* Lord Raym. 743.—Mar. 95. 96.

□ Poth. pl. 15.

‡ Mar. 93.

† Esp. Ca. N. P. 261.

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London^w and

Aleppo	{ sometimes accounted as treble usance, }			do.
Antwerp	1	calendar month		do.
Brabant	1	do.	-	do.
Bilboa	2	do.	-	do.
Bruges	1	do.	-	do.
Cadiz	2	do.	-	do.
Flanders	1	do.	-	do.
France ^x	30	days	-	do.
Florence	{ sometimes accounted as treble usance, }			do.
Genoa	3	calendar months		do.
Hamburgh	1	do.	-	do.
Holland	1	do.	-	do.
Leghorn	3	do.	-	do.
Lisbon	2	do.	-	do.
Lucca	sometimes 3			- do.
Lisle	1	do.	-	do.
Madrid and all Spain	{ 2			do. - do.
Middleburg	1	do.	-	do.
Milan	3	do.	-	do.
Portugal	2	do.	-	do.
Paris ^x	1	do.	-	do.
Rotterdam	1	do.	-	do.
Rome	3	do.	-	do.
Roan	1	do.	-	do.
Spain	2	do.	-	do.
Venice ^y	3	do.	-	do.
Zant	3	do.	-	do.
Zealand	1	do.	-	do.

^w Molloy, tit. Bills of Ex.
2 vol. 2d book, c. 10, s. 12.
—Beawes, pl. 259. — Mar.
p. 60, 74.

^x Poth. 15, *acc.* Molloy,
84, *contra.*
^y Lutw. 885.

Usance

Usance between Amsterdam ² and	{ Brabant, France, Fland- ders, and Holland or Zea- land, is 1 calendar month.	PART I. CHAP. VI.
Usance between Amsterdam and	{ Italy, Spain, and Portu- gal, is 2 calendar months ⁴ .	
Usance between Amsterdam and	{ Frankfort, Nuremburg, Vienna, & other places in Germany, on Hamburg & Breslau, 14 days after sight, 2 usances 28 days, and half usance 7 days.	

These usances are calculated exclusive of the date of the bill. At the expiration of the appointed usance, the bill would be apparently due, but the custom of merchants, as has before been shewn, has allowed the drawee further time, called days of grace, which are in general calculated as before-mentioned, exclusive of the last day of usance; and on the last of these days the bill should be presented for payment.

When bills or checks are payable at one, two, or more *months after date or sight*, it is observable that the mode of computing the time when they become due, differs from the usual mode of computation. In general, whenever a deed or other instrument, or act of parliament, mentions a month, it is construed to mean a lunar month, or twenty-eight days, unless otherwise expressed^b; but in the case of bills and checks, the rule is otherwise; and where a bill is made payable at a month or months after date, the computation must in all cases be by calendar, and not by lunar months.

² Molloy, 84.—Kyd, 4, 5.

^a 12 Mod. 410.

^b 2 Bla. Com. 141.—6 T.

R. 224.

Thus,

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Thus, when a bill is dated the 1st of January, and payable at one month after date, the month expires on the 1st of February^c. Where one month is longer than the succeeding one, it is said to be a rule not to go, in the computation, into a third month. Thus, on a bill dated the 28th, 29th, 30th or 31st January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases in leap year, on the 29th^d.

When a bill purports to be payable *after* so many days *sight*, the days are computed from the day the bill was accepted, or protested for non-acceptance, and not from the date of the bill, or the day the same came to hand, or was privately exhibited for acceptance to the party on whom it was drawn; for the sight must appear in a legal way, which is either by the parties accepting the bill, or by protest made for non-acceptance^e.

With respect to bills payable *at sight*, the judicial decisions and the treatises are at variance on the question, whether days of grace are allowable or not. Pothier^f, enumerating the various kinds of bills, states that a bill payable at sight is payable as soon as the bearer presents it to the drawee; but in a following part of his work^g, it appears that this opinion is founded on the words of a

^c Beawes, pl. 253.—Mar. 74, 90.

^d Mar. 75.—Kyd, 6.

^e 6 T. R. 212.—Com. Dig. tit. Merchant, F. 7.

^f Pl. 12, 198.

^g Id pl. 172.

French ordinance, which cannot extend to bills payable in this country: however, he assigns as a reason, that it would be inconvenient, if a person who took a bill at sight payable in a town through which he meant to travel, and the payment of which he stands in need of for the purpose of continuing his journey, should be obliged to wait till the expiration of the days of grace after he presented the bill; and this reason seems to be applicable to the case of a bill made payable at sight, in this or any other country. Beawes, in his *Lex Mercatoria*^h, says, that bills made payable here at sight, have no days of grace allowed, although it would be otherwise in the case of a bill made payable one day after sight. Mr. Kyd, in his treatiseⁱ, expresses the same opinion. In a later treatise^j, to the author of which the profession is highly indebted, it is said that a bill payable at sight, is either payable immediately upon presentment, or within the days of grace afterwards. With respect to the adjudications on the subject, it is proper to observe, that in *Dehers v. Harriett*^k, it was taken for granted that days of grace are allowable on a bill payable at sight. The same point was decided in *Coleman v. Sayer*^l. And in a late case^m, where the question was, whether a bill payable at sight was in-

^h Pl. 256.ⁱ Page 10.^j Bayl. 62.^k 1 Show. 163.^l 1 Barnard, Rep. B. R.

303.—Vin. Ab. tit. Bills of Exchange, B.

^m 1 Anson v. Thomas, B.R.

T. 24 G. III.—Bayl. 23 n.b.

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cluded under an exception in the stamp act, 23 G. III. c. 49, s. 4? the court held that it was not; and Buller J. mentioned a case before Willes Ch. J. in London, in which a jury of merchants was of opinion, that the usual days of grace were to be allowed on bills payable at sight.

When a bill or check is expressed to be payable *on demand*, or where *no time of payment is expressed*, it is payable instantly on presentment, which may be made directly after it is delivered to the payee, without any allowance of days of grace; and the presentment for payment of such a bill or check, must be made within a reasonable time after the receipt of it.

It has been long the subject matter of discussion, whether it is the province of the jury or the court, to decide as to the reasonableness of the time within which a bill or check ought to be presented for payment. If the question were to be considered without reference to decisions, it should seem that the determination of it ought to be left to the jury; and this was formerly the case; but the decisions of juries, even of mercantile men, were found much at variance with each other: thus, in some cases, the keeping of such a bill or check three, four, or five days, was held not too long^a; and in another case it was held that the presentment must be made within two days^b; and in subse-

^a 2 Freem. 247, 257.

^b Stra. 508.

quent cases, that it should be made the day the bill is received, and that even an hour is an unreasonable time^p. Our courts therefore, on recent occasions, have, for the sake of certainty, and of avoiding the great inconvenience arising from such contradictory verdicts, laid it down as a rule, that it is for the court, and not for the jury, to decide on the propriety of a presentment of such bills for payment, with reference to the time when it should be made^q. But this doctrine is by no means universally assented to^r. If it is a question of fact, it should seem that, according to the opinion of juries of merchants of the present day, a check on a banker ought, if given in the place where it is payable, to be presented for payment the same day it is received^s, if the distance, or other common circumstances will allow of it: if, on the contrary, the question is to be considered as dependent on the usage of merchants, as already settled by judicial decisions, the result of those decisions is, that a presentment of a draft, or banker's note, payable in the place where it was given, may be made at any time before twelve o'clock on the day after the receipt of it^t, or at

^p 1 Bla. Rep. 1, 168.—Brown v. Collinson, Beawes, pl. 229.—Kyd, 45.—Appleton v. Sweetapple, Bayl. 65.

^q 1 T. R. 168.—Appleton v. Sweetapple, Bayl. 65.

^r Doug. 515.—2 H. B. 568, 9.

^s Appleton v. Sweetapple,

B. R. M. 23 G. III.—Bayl. 65, n. c.—Esp. Ni. Pri. 58. Brown v. Collinson, Beawes, pl. 229.—Kyd, 45.—1 Bla. Rep. 1.

^t Stra. 415, 6, 910, 1175, 1248.—Lord Raym. 928.—Holt, 120.—1 T. R. 168, Appleton v. Sweetapple, Bayl. 65.

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any time within twenty-four hours after such receipt". From this uncertainty as to the time within which a check, or other instrument payable on demand, should be presented, it is obvious that it must be advisable in all cases for the holder to demand payment the same day he receives it, unless prevented by distance, or some inevitable cause or accident, which in all cases will excuse the neglect to make a presentment so soon as it would otherwise be necessary. Where a check or bill payable on demand is given to a person at a distance from the place where it is payable, it is impossible to lay down any precise rule relative to the time when it must be presented, for that must depend on the distance, and circumstances peculiar to each individual case. The rule is generally, that it must be presented as soon as possible^w; and the time for presentment seems to be governed by the same rules as regulate that within which notice of non-acceptance must be given^x.

A presentment of a bill for payment should in all cases be made within a reasonable *time* before the expiration of *the day* when it is due; and if by the known custom of any particular place, bills are only payable within limited hours, a presentment there out of those hours is improper. This rule is said to extend also to a presentment out of the hours of business to a person of a particular

^w Brown v. Collinson,
Beawes, pl. 229.—Kyd, 45.

^w 2 H. B. 565.

^x *Ante* 96.

descrip-

description, where, by the known custom of the place, all such persons begin and leave off business at stated hours ^y.

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On presentment for payment, the bill, unless paid, must not be left, and if it is, the presentment is not considered as made until the money is called for ^z.

PAYMENT of a bill may not only be made by the acceptor, but also by any other party to it, and even by a total stranger, as in the case of a payment *supra protest* ^a, which will be spoken of hereafter; and that of payment by the bail of either of the parties ^b.

Sect. 2.—Of payment; and 1st, by and to whom it may be made.

Payment should always be made to the real proprietor of the instrument, or to some person properly authorized by him to receive it, and payment to the payee will consequently be inoperative, if he has ceased to be the proprietor of it, by having indorsed it to another person ^c. On the same principle, if the holder of a bill dies, payment should not be made to his personal representative, unless they have a power of administering his effects ^d. On a bill payable to *A.* or order, to the use of *B.* payment should be made to *A.* or order, and not to *B.* ^e. If a bill is benefi-

^y Bayl. 59, 67.

^z Stra. 550, *acc.* Stra. 416, 910, *contra*.

^a Poth. pl. 170.

^b 1 Wils. 46.

^c Poth. pl. 164.

^d Id pl. 166.

^e 2 Vent. 310, *ante* 112.

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cial to a minor, payment to him would be valid^f; but a payment to a married woman, after knowledge of that fact, would not discharge the person making it^g. Where a bill is indorsed to a person merely for the purpose of receiving payment for the indorser, and the authority given to the indorsee is afterwards revoked either by the party himself or by operation of law, as by his death, it is said that payment to the indorsee will not discharge the person making it, if he had notice of the revocation^h. This doctrine, indeed, is objected to by Beawes, in his *Lex Mercatoria*ⁱ, and it must certainly be confined to the single case of an indorsement to an agent for the purpose of his receiving payment for his principal. We have before seen^j, that in general, where the holder of a bill with an indorsement in blank, or payable to bearer, in both which cases possession is evidence of property, loses or is robbed of it, and the person finding or stealing it, presents it to the drawee at the time it is due, and he pays it without knowing of the loss or robbery, such payment will discharge him; and although he had notice of such fact, yet if the person presenting the bill to him was a *bonâ fide* holder, such notice would not invalidate the payment; but a payment before a bill or check is due, will not discharge the drawee, unless made to the real pro-

^f Poth. pl. 166.^g Id pl. 167.^h Id pl. 168, et Mar. 72, 3.

—Ante 119.

ⁱ Pl. 219.^j Ante 125.

prietor of it ; and therefore, where a banker paid a check the day before it bore date, which had been lost by the payee, it was adjudged that he was liable to repay the amount to the person losing it^k : and it is perhaps advisable, that an acceptor should in no case pay a bill before it is due^l, or after notice from the drawer or indorser not to pay it^m. Where a bill is transferable only by indorsement, and it is lost by the person entitled to indorse, no other person can transfer the interest in the bill ; and consequently a payment by the drawee even to a *bonâ fide* holder will not in such case be protectedⁿ.

Payment to a person or his order, after the knowledge of his having committed an act of *bankruptcy*, would be inoperative^o. Thus it has been adjudged, that if a banker pays the draft of a trader keeping cash with him, after notice of an act of bankruptcy, the assignees may recover the money paid, either from the banker^p or from the payee of the check, if such payee had notice of the bankruptcy^q. But a payment made to a bankrupt or his order without notice of his being so, will in all cases discharge the person making it^r : and it has been recently adjudged, that if a

^k *Ante* 125.^o Cooke's Bkpt. Laws, last edit. 584, 5.^l Com. Dig. tit. Merchant, F. 7.—Mar. 129, 130.^p 2 T. R., 113.—3 Bro.^m 1 H. B. 89.—Mar. 129. 313.

—Com. Dig. tit. Merchant, F. 7.

^q 2 T. R. 287.^r 1 Jac. I. c. 15, s. 14.ⁿ 4 T. R. 28.—2 Doug.

637, et ante 125.

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debtor, after the secret act of bankruptcy of his creditor, gives him his acceptance in discharge of the debt, he may afterwards pay such acceptance to the holder of the bill, although between the time when he accepted and the time when the bill became due, he heard of the drawer's bankruptcy: the giving, indorsing, or accepting a bill of exchange, being considered as an immediate payment within the meaning of the statute of James, which protects *bond fide* payments made to a bankrupt, provided the bill is honoured when due'. So likewise, a payment made by a bankrupt to a person not having notice of the bankruptcy, and being a *bond fide* creditor for goods sold, or by the bankrupt's having drawn, negotiated, or accepted a bill of exchange in the usual or ordinary course of trade and dealing, is protected by the statute 19th Geo. II. c. 32. This statute has been construed not to protect any payments except those expressly provided for, and therefore money paid by a trader after a secret act of bankruptcy, to a carrier, for the carriage of goods, may be recovered back in assumpsit by the assignees of the bankrupt'. It has been also adjudged, that if the holder of a bill gives time to the acceptor, upon condition that he should allow interest, and he afterwards pays the bill, having previously committed a secret act of bankruptcy, this is not a payment in the course

* 5 T. R. 711.

* 5 T. R. 197.

of trade within the meaning of the statute". So PART I.
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The general rule with respect to the time allowed for the payment of money, where a day certain is appointed, is, that the party bound has till the last moment of the day to pay it in^w; but it is otherwise with respect to *foreign* bills, for as the protest for non-payment of them should be made on the last day of grace^x, so as to be sent if possible by the post on that day, it follows that the holder may insist on payment on demand, or at least before the hours of business are expired. With respect to *inland* bills, it does not appear to be settled, whether the acceptor has not the whole day for payment^y. It certainly is not usual or necessary to give notice of non-payment before the following day, and therefore there can be no objection to the allowance of the whole day on which the bill

^u 2 T. R. 648.

^v 2 H. B. 334.

^w 1 Rol. Rep. 189.—1
Saund. 287.—4 T. R. 173.

^x 1 Ld. Raym. 743, *et post.*

^y 4 T. R. 170.

becomes

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becomes due, to pay it in. At all events, if the holder makes a second presentment on the last day of grace, the acceptor may insist on paying it when such presentment is made, without paying the fees of noting or protesting², notwithstanding such presentment is made after banking hours, and expressly for the purpose of noting and protesting³.

3dly, Payment how made; and of the consequence of compounding, and of receiving a part.

Where a bill is made here, and payable in a foreign country in foreign coin, the value of which coin is reduced by the government of that country, it is said that the bill shall be payable according to the value of the money at the time it was drawn⁴. Payment is frequently made by a draft on a banker, in which case, if the person receiving the draft does not use due diligence to get it paid, the person from whom he received it will be discharged⁵, but not otherwise, unless the holder expressly agreed to run all risks: and it has been adjudged, that the act of writing a receipt in full will not be evidence of such agreement⁶. When payment is made by the drawee's giving a draft on a banker, Marius advises the holder not to give up the bill until the draft is paid⁷; but the modern usage is otherwise; and it has been recently decided, that a banker having a bill remitted to him to present for payment, was not guilty of negligence in giving it up, upon

² Poth. pl. 140.

³ 4 T. R. 170.—Bayl. 67. 123.

⁴ Skin. 272.

⁵ Lord Raym. 930, *et ante*

⁶ *Ante* 123.

⁷ Mar. 21.—12 Mod. 521.

receiving

receiving a check upon another banker for the amount, although such check was afterwards dishonoured^f.

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If, when the bill becomes due, the acceptor is a bankrupt, the holder may without the assent of the other parties, prove the bill under the commission, and receive a dividend or dividends, and such conduct will not discharge the other parties to the bill from their respective obligations to him, if he has given regular notice of non-payment; but if the holder of a bill *compounds* with the acceptor without the assent of the other parties to it, he thereby releases them from their liabilities: and this seems extremely reasonable, for there is a material distinction between taking a sum of money in part satisfaction of a debt, as in the case of a dividend, and taking a sum in lieu and complete satisfaction of such debt; as where the holder of a bill compounds with the acceptor, and thereby deprives all other parties to the bill of the right of resorting to him^g. So likewise, the taking a bond in satisfaction of the bill, or any security for it, without the assent of the other parties to the bill, would operate in their discharge^h; but it has been adjudged, that the holder of a bill may resort to all the parties to it, after having let an indorser, whom he had taken in execution, out of gaol on a letter of license, without

^f 6 T. R. 12.

^g 3 Mod. 87. — Cooke's

^h Cooke's Bkpt. Laws, last edit, 168, and cases there cited.

Bkpt. Laws, 167.

paying

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paying the debt¹. It appears to have been adjudged, that if on presentment for payment, the holder of a bill *takes less than the whole sum* due thereon of the acceptor, in part satisfaction, without the assent of the other parties to the bill, such conduct will discharge them, because, as it is said, it is an election to have his money from the acceptor; and it is the general received opinion, that this will be the case although the holder has given due notice of the partial dishonour²; but two writers of authority say, that if a bill regularly accepted, is presented for payment, and the whole sum is not paid, the holder may receive part in payment, and if he immediately protests for non-payment of the residue, such partial receipt will not release the obligation which the other parties are under to pay the residue, because the having obtained part of the money is in favour of such parties³. It seems clear, that the taking a part from the acceptor, will in no case discharge the drawer, if the bill was for accommodation only⁴. If the holder of an accommodation bill receives a part from the drawer, and takes a promise from him upon the back of the bill, for the payment of the residue at an enlarged time, it may be doubtful whether

¹ 2 Bla. Rep. 1235.

² Lord Raym. 744.—Kellock v. Robinson, Sel. Ca. 147.—Bul. N. P. 273.—Stra. 745, S. C.

³ Bul. Ni. Pri. 271, 273,

275.—Mar. 86.

⁴ Cooke, 167.

such

such act will discharge the acceptor^m. It is said, PART I.
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On payment of the amount of a bill or note, 4thly, Of
the receipt
for payment. it may be doubtful whether the person paying can insist on a receipt being given^o; but it is usual to give a receipt on the back of the bill, which need not, like other receipts, be stamped^p. Where an action was brought by the indorser of a bill, who had paid it to an indorsee against the acceptor, he was nonsuited, although he produced the bill and protest, because he could not produce a receipt for the money paid by him to the indorsee upon the protest, according to the custom of merchants; though Holt C.J. seemed to be of opinion, that if the plaintiff could have proved payment by any evidence, it would have been sufficient^q. As a general receipt on the back of a bill of exchange, is *prima facie* evidence of its having been paid by the acceptor^r, it would perhaps be advisable, in all cases where payment is made by a drawer or indorser, to state in the receipt, that it

^m Ellis v. Gallindo, cited p 23 Geo. III. c. 49, s. 4
Doug. 250.—Bayl. 55, acc. and 7.

ⁿ H. B. 88, *semb. contra*.

^q Lord Raym. 742.

^r Mar. 68, 85, 86.

^s Peake, 25.

^t Peake, 179, 180.

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was made by him, by which means he will not be put to the trouble of proving payment by a witness.

gthly, Of
the effect of
payment.

The effect of payment may in a great measure be collected from the immediate preceding paragraphs, and from what has been said with respect to a transfer of a bill of exchange after it has been paid. It is here proper to remind the reader, that if a person, under a misapprehension of facts, or, according to a late decision, of the law arising out of them, has paid a bill which he was under no legal obligation to discharge, as where the person whom he paid had been guilty of laches, which, had the bill not been paid, might in an action brought upon it have been a sufficient ground of defence, he may in general recover back the money, in an action for money had and received to his use*.

Sect. 3.—Of
the conduct
which the
holder
should pur-
sue on non-
payment.

If, on presentment for payment, the person who ought to pay the bill refuses to do so, it is in general incumbent on the holder immediately to *protest* it, if the bill was foreign, and whether foreign or inland, to give *notice* of the dishonour to those parties to whom he means to resort for payment, or they will be discharged from their respective obligations. The observations relative to notice of non-acceptance, are so immediately applicable to notice of non-payment, that it will

* *Ante* 102, n. 1.

be unnecessary to enquire when such notice is requisite, or by or to whom it should be sent : it will be sufficient to point out the mode in which, and the time when, notice of non-payment should be given.

The protest for non-payment of a *foreign* bill, which is made by a notary public, varies in point of form, according to the country in which it is made : in England the form of it is as follows :

On this day, the first of January, in the year of our Lord one thousand seven hundred and ninety-nine, at the request of C. D. bearer of the original bill of exchange, whereof a true copy is on the other side written, I, Y. Z. of London, notary public, by royal authority duly admitted and sworn, did exhibit the said bill.

(Here the presentment is stated, and to whom made, and the reasons, if assigned, for non-payment.)

Therefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the drawer, acceptor, and indorser of the said bill of exchange, as against all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered, and to be suffered, for want of payment of the said original bill. Thus done and protested in London aforesaid, in the presence of E. F.

[The expences of noting and protest are here subscribed, for the amount of which, see the appendix.]

This protest must, since the 37 Geo. III. c. 90, be stamped with a *four* shilling stamp. It should not bear date before the bill is due¹, but as it must be made on the last day of grace², it may bear date generally on that day.—

¹ Mar. 103.—6 T. R. 212. ² 4 T. R. 170, *et post*.

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It is the advice of Marius, when an accepted bill is protested for non-payment, to send the protest to the drawer or indorser, and to keep the accepted bill, unless express orders are given by those parties to the contrary, because the protest for non-payment, with the second accepted bill, will be sufficient proof against the drawer, though not against the acceptor^v. But according to another writer^w, the drawer or indorser would not be obliged to pay without having the accepted bill delivered up to him, as he would otherwise perhaps have no evidence of the acceptance against the acceptor. Where payment is dishonoured of a non-accepted bill, it is agreed on all hands that there is no risk in sending back the bill with the protest^x. Where only part of the money for which the bill is payable is tendered, that part may be taken, and the bill must be protested for non-payment of the residue^y.

Previous to the statute 9th and 10th W. III. c. 17, no *inland* bill could be protested for non-payment; but by this statute it is enacted, that all bills of exchange drawn in, or dated at, and from any place in England, for the sum of *five pounds* or upwards, upon any person in London, or elsewhere in England, in which bills of exchange shall be expressed *value received*, and payable at a certain number of *days, weeks,*

^v Mar. 120.^x Mar. 121.^w Beawes, pl. 220.—Lovl. 100.^y Mar. 68, 85, 86, 87, *ante* 156.

or months after the *date* thereof, after presentation and written acceptance, and *after* the expiration of the days of grace, the holder or his agent may cause the bill to be protested by a notary public, and in default of such notary public, by any other substantial person in the place, in the presence of two witnesses; refusal or neglect being first made of due payment of the same: which protest shall be made and written under a copy of the bill of exchange, in the words or form following:

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“ Know all men, that I *A. B.* on the
 “ day of at the usual place of abode of the
 “ said have demanded payment of the bill
 “ of the which the above is the copy, which the
 “ said did not pay, wherefore I the said
 “ *A. B.* do hereby protest the said bill. Dated
 “ this day of .”

The act directs that this protest shall within fourteen days after it is made, be sent, or notice of it given, to the party from whom the bill was received, who is, upon producing such protest, to repay the bill, together with all interest and charges from the day such bill was protested; for which protest shall be paid a sum not exceeding the sum of *six-pence*; and in default or neglect of such protest, or due notice of it, the party forfeits his right of action.

It has been adjudged, that the holder of a bill, payable after sight, is not entitled to the accumulative

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lative remedy given by this statute², and that a bill within the meaning of the act, cannot be noted or protested until the day after the last day of grace³. It has also been decided, that as the directions of the statute are positive that no sum exceeding six-pence shall be taken for the protest, no larger sum can legally be demanded, notwithstanding it is customary to charge more⁴. It is doubtful, whether the clerk of a notary can, under this statute, make the demand of payment⁵. The act only gives an additional remedy, and does not take away the common law one, and therefore it is not necessary to protest, it being in all cases sufficient to give notice of non-payment⁶.

A protest for the non-payment of a *foreign* bill, must be made on the day of refusal⁷; and notice of the dishonour should be sent to the parties to whom the holder means to resort, by the earliest ordinary conveyance⁸. But in the case of an *inland* bill, no protest for non-payment can be made until the day after it is due⁹; and it may be doubtful whether notice of the dishonour of such a bill can in any case be given until the day after that on which it is due, as it is said that the acceptor has the whole of the day to pay it in¹⁰. Notice, however, must be given on the following

² 4 T. R. 170.³ Id *ibid*.⁴ Id *ibid*.—See the list of notary's fees in the appendix.⁵ Id 175.⁶ Lord Raym. 992.—Stra.

910.—3 and 4 Ann, c. 9, s. 5.

—2 Bla. Com. 469.

⁷ 4 T. R. 174.—Ld. Raym.

743.

⁸ Ante 95, 6, 7.⁹ 4 T. R. 170.¹⁰ Id *ibid*.

day,

day, whether the parties live in the same or at another place¹, or the party neglecting will subject himself to the same loss as in case of a neglect to give notice of a refusal to accept.

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PAYMENT of a bill, whether foreign or inland¹, being dishonoured, any third person, not party to it, as he might have accepted, so he may pay it, for the honour of the drawer or any of the indorsers^k; which payment, as it is always made after protest, is called payment *supra protest*¹; but the acceptor, provided he has previously made a simple acceptance, cannot pay in honour of an indorser, because, as acceptor, he is already bound in another capacity^m: he may, however, when he has accepted a bill without having effects of the drawer in his hands, and no provision has been made by him, suffer the bill to be protested, and then pay *supra protest*ⁿ; in which case he will have a remedy on the bill against the drawer.

Sect. 4.—Of
payment
supra pro-
test.

In general, no person should pay in honour of another person, before the bill has been protested for non-payment; and it is said that he should not even then make such payment, before he has declared to a notary public for whose honour he intends making it, of which declaration the notary

¹ 1 T. R. 168, 9. — Doug. 515. — 2 H. B. 565.

¹ 1 T. R. 269.

^k Lutw. 891, 892.

¹ Beawes, pl. 50. — Mar. 128.

^m Beawes, pl. 51.

ⁿ Id pl. 52.

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must give an account to the parties concerned, either in the protest itself, or in a separate instrument^o.

If, however, the acceptor *supra protest* for the honour of a drawer or indorser, receives his approbation of the acceptance made, he may freely pay the bill without any protest for non-payment^p.

Although, with respect to other debts, a stranger who has no interest in them does not, by paying them, entitle himself to the rights of a creditor, unless he has the consent of the creditor or debtor to such payment^q; yet with regard to bills of exchange, a stranger who pays them in case of protest, acquires all the same rights that the proprietor of the bill had, although no regular transfer of the bill was made to him^r; and he may maintain an action against the person for whose honour he discharged the bill, either on the instrument itself^s, or on the count for money paid to the defendant's use^t. The reason of this exception to the general rule is, that it induces the friends of the drawer or indorsers to render them this service, and by that means preserve the honour of commerce, and the credit of the trader^u.

^o Beawes, pl. 53.—Mar. 128.

^p Beawes, pl. 48.

^q 1 Rol. Ab. 11.—Hob. 105.—1 T. R. 20.—2 H. B. 83, 91.

^r Esp. Ni. Pri. 112.—Poth. pl. 171.

^s Lutw. 891.

^t 1 T. R. 269.

^u Beawes, pl. 54.—Poth. pl. 171.

CHAPTER SEVENTH.

OF PROMISSORY NOTES—BANKERS' NOTES,
AND BANK OF ENGLAND NOTES.

THE right which may be acquired by bills of exchange, and checks or drafts, on a banker, having been pointed out in the preceding chapters, it remains in the present to make a few observations relative to promissory notes, bankers' notes, or what are commonly called cash notes, and Bank of England notes.

A *promissory note* is said to be in the nature of a bill of exchange drawn by the maker upon himself, and is defined to be a plain and direct engagement in writing, to pay a sum specified, at the time therein limited, or on demand, to a person therein named, or sometimes to his own order, or often to the bearer^a. Observing on the origin and nature of promissory notes, it has been well remarked by a modern writer^b, that as commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment, and of obtaining credit, than through the medium of bills of exchange, to which

^a 2 Bla. Com. 467.^b Kyd, 18.

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there are, in general, three parties. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods, absolutely necessary, might have so limited a connection with the commercial world at large, that he could not easily furnish his creditors with a bill of exchange on another man, but his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader. The validity of these instruments, although favoured by many judges, met with a strenuous opponent in Lord Holt, who, as it is observed^c, most pertinaciously adhered to his opinion, that no action could be maintained on a promissory note, as an instrument, but that it was only to be considered as evidence of a debt. He maintained that actions upon such notes, as instruments, were innovations upon the rules of common law; and that declarations upon them amounted to the setting up a new sort of specialty unknown in Westminster-hall^d. The learned judge appears to have retained this opinion in a case^e where judgment for the plaintiff, in an action on a promissory note, was reversed, on the ground that the custom alledged in the declaration was void, since it tended to bind a man to pay money with-

^c 4 T. R. 151.

^d 2 Ld. Raym. 757.

^e Id 759, *et vid.* 6 Mod.
29, 30.—3 Burr. 1520.

out any consideration. This question agitated and exercised the judgment of the most able lawyers of the last century; but the authority and weight which Lord Holt's opinion had in Westminster-hall, made others yield to him; and the merchants found it necessary to resort to the legislature^f. In consequence of their application, the 3d and 4th Ann, c. 9, made perpetual by 7th Ann, c. 25, s. 3, was passed; by which, after reciting that it had "been held, that notes in writing, signed by the party who made the same, whereby such party promised to pay unto any other person, or his order, any sum of money therein mentioned, were not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note was payable, could not maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note had been assigned, indorsed, or made payable, could not, within the custom of merchants, maintain any action upon such note against the person who first drew and signed the same: it was, to the intent to encourage trade and commerce, which would be much advanced, if such notes *should have the same effect as inland bills of exchange,* and should be *negotiated in like manner*; enacted,

^f 4 T. R. 151.

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“ that all notes in writing, made and signed^s by
 “ any person or persons, body politic or corpo-
 “ rate, or by the servant or agent of any corpo-
 “ ration, banker, goldsmith, merchant, or trader,
 “ who is usually entrusted by him, her, or them,
 “ to sign such promissory notes for him, her, or
 “ them, whereby such person or persons, body
 “ politic and corporate, his, her, or their servant
 “ or agent as aforesaid, doth or shall promise to
 “ pay to any other person or persons, body po-
 “ litic and corporate, his, her, or their order, or
 “ unto bearer, any sum of money mentioned in
 “ such note, shall be taken and construed to be,
 “ by virtue thereof, due and payable to any such
 “ person or persons, body politic and corporate,
 “ to whom the same is made payable ; and also
 “ every such note payable to any person or per-
 “ sons, body politic and corporate, his, her, or
 “ their order, shall be assignable or indorsable
 “ over, *in the same manner as inland bills of ex-*
 “ *change* are or may be, according to the custom
 “ of merchants ; and that the person or persons,
 “ body politic and corporate, to whom such sum
 “ of money is or shall be by such note made pay-
 “ able, shall and may maintain an action for the
 “ same, *in such manner as he, she, or they, might*
 “ *do, upon any inland bill of exchange, made or*
 “ drawn according to the custom of merchants,
 “ against the person or persons, body politic and

^s Vin. Ab, tit. Bills of Ex- Lord Raym, 1376.
 change, H.—1 Stra. 399.—

" corporate, who, or whose servant or agent as ^{PART I.}
 " aforesaid, signed the same ; and that any per- ^{CH. VII.}
 " son or persons, body politic and corporate, to
 " whom such note that is payable to any person
 " or persons, body politic and corporate, his, her,
 " or their order, is indorsed or assigned, or the
 " money therein mentioned ordered to be paid
 " by indorsement thereon, shall and may main-
 " tain his, her, or their action for such sum of
 " money, either against the person or persons,
 " body politic and corporate, who, or whose ser-
 " vant or agent as aforesaid, signed such note,
 " or against any of the persons that indorsed the
 " same, *in like manner as in cases of inland bills*
 " of exchange."

This statute places promissory notes on the same footing as bills of exchange, and consequently the decisions relative to the one are in general applicable to the other. Thus it has been adjudged, with respect to the time when a note is payable, that there is no difference between bills and promissory notes ; and the latter, when payable at a stated time, are also entitled to days of grace^h. In *Carlos v. Fancourt*ⁱ, where the question was, whether or not a note payable out of a particular fund could be declared on as a promissory note, it was decided in the negative, " because promissory notes must stand or fall on the same rules by which bills of exchange are

^h 4 T. R. 152.

ⁱ 5 T. R. 486.

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“governed.” In *Heylyn v. Adamson*^j, Lord Mansfield declared, that though, while a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange, yet that when it is indorsed, the resemblance begins : for then it is an order by the indorser upon the maker of the note, to pay to the indorsee ; the indorser becomes, as it were, the drawer ; the maker of the note the acceptor ; and the indorsee the payee. This point of resemblance once fixed, the law relative to bills becomes applicable to promissory notes.

Bankers' cash notes, or goldsmiths' notes, as they were formerly called, are nothing more than promissory notes given by bankers^k, who were originally goldsmiths. From Lord Holt's judgment in the case of *Buller against Crips*^l, it appears that these notes were attempted to be introduced by the goldsmiths about thirty years previously to the reign of Queen Ann, and were generally esteemed by the merchants as negotiable ; but Lord Holt as strenuously opposed their negotiability as he did that of common promissory notes, and they were not generally settled to be negotiable until the statute of Ann was passed, which relates to these as well as to common promissory notes. They appear originally to have been given by bankers to their customers, by way

^j Burr. 676.^k Stra. 415, 550.^l 6 Mod. 29, 30.—Lord Raym. 180.—3 Lev. 299.

of acknowledgment for having received money for their use^m. At present, cash notes are seldom made or issued, except by country bankers, their use having been superseded by the introduction of checks. When issued by London bankers, they are called shop notes: in point of form, they are similar to common promissory notes payable to bearer on demand, and are stated in pleading as such. On account of their being payable on demand, they are considered as cash, whether payable to order or bearerⁿ. They are, like bankers' checks, generally transferred from one person to another by delivery. They may, however, be negotiated by indorsement, in which case the act of indorsing will operate as the making of a bill of exchange, and the instrument may, in such case, be declared on as such against the indorser^o. In other respects, they are governed by the same rules as bills of exchangeⁿ.

Bank notes owe their origin to the 5th William and Mary, c. 20, s. 19, 20, and the 8th and 9th William III. c. 20, s. 30, by the first of which statutes, power was given to the King to incorporate the persons subscribing towards the raising and paying into the receipt of the exchequer the sum of 1,200,000l. by the name of "the Governor and Company of the Bank of England."

^m Holt, 119.—1 Salk. 283. 743.—1 Salk. 132, 3.—4 T.

ⁿ Lord Raym. 744.—Peacock v. Rhodes, Doug. 635. R. 149. P 1 Salk, 132.

^o Love, 58.—Lord Raym.

These

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These notes are uniformly made payable on demand: they, as was said by Lord Mansfield, are not, like bills of exchange, mere securities or documents for debts, nor are so esteemed; but are treated as money in the ordinary course and transactions of business, by the general consent of mankind; and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.—They pass, by a will which bequeaths all the testator's money or cash. In bankruptcies they cannot be followed as identical and distinguishable from money. If they be lost, indeed, an action of trover will lie against the finder by the true owner⁹. In a case, likewise, on the annuity act, where the whole consideration was described in the memorial as money, and it appeared that only a part of it was money, and the residue bank notes, it was decided on the above principle, that the consideration was well set out¹. It has, however, been adjudged, that an action for money had and received will not lie against a finder of them, to recover the value, unless money has actually been received for them². Nor are bank notes in any case a legal tender, if objected to at the time of the offer³, though, after such a tender, a creditor cannot arrest his debtor, it having

⁹ Per Lord Mansfield, in *Miller v. Race*, 1 Burr. 457.

² 3 T. R. 554.—6 T. R. 335.

¹ *Noyes v. Price and another*, Sittings, London, *post*, Hil. T. 16 Geo. III.

³ 3 T. R. 554.

been recently enacted^u, that no person shall be held to bail, unless the affidavit of the debt alledge that no offer has been made to pay the debt in bank notes payable on demand. PART I.
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A formal set of words is, in general, no more essential to the validity of a promissory note, cash note, or Bank of England note, than it is to that of a bill of exchange. It is sufficient if a note amounts, in point of fact, to a promise to pay money, and consequently a note, whereby a man promises to *account* with another, or his order, for a certain sum, value received, will have the operation and effect of a promissory note, though it contains no formal promise to pay^v. The mere acknowledgment, indeed, of a debt, without some words from whence a promise, in fact, to pay money, can reasonably be inferred, will have no other operation than being *prima facie* evidence of a debt, and therefore the common memorandum, *I O U*, has been determined not to amount to a promissory note^w. Certain requisites are indispensable to their validity: thus, they must be made payable at all events^x, and not out of a particular fund^y; and they must be for the payment of money only, and not for the performance of any other act^z: on the latter principle it was adjudged, that a written promise to pay 300*l.* to *B.* or order, “in three good East

^u 38 Geo. III. c. 1, s. 8. —Burr. 323.—Stra. 1151.—

^v 8 Mod. 362.—1 Stra. Comb. 227.—4 T. R. 149.—
629, 786.—Ld. Raym. 1396. 7 T. R. 243, *ante* 32, 3, 4.

—2 Atk. 32, *ante* 31.

^w Esp. Ca. N. P. 426.

^y *Ante* 32, 3, 4.

^z Bul. N. P. 272.—Bayl. 4,

^x 4 Mod. 242.—8 Mod. 363. *ante* 32, 4.

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India bonds," was not a promissory note^z; and that an undertaking "to pay money, *and* deliver up horses and a wharf" on a particular day^a; or an engagement "to pay money on demand, *or* surrender the body of *A. B.*"^b, would not operate as a note within the statute of Ann.

It has been said^c, that in the application of the rule relative to these instruments being payable at all events, there is a material distinction between bills of exchange and promissory notes, and that a note may in certain cases be payable on a contingency; and this idea is certainly sanctioned by what was said in the case of *Dawkes v. Deloraine*, reported in 2 Bla. Rep. 782; but, with deference, it is presumed that the cases^d adduced in support of this distinction, are equally applicable to bills of exchange: and indeed it has been recently adjudged, that in general, if a note is payable on a contingency, it will be as inoperative as a bill payable in the same manner^e. It has also been observed^f, that in the application of the principle, that these instruments must not be payable out of a particular fund, there is a material distinction between bills of exchange and promissory notes; but the case^g adduced in support of this opinion, only shews that the statement in a bill or note, of the consideration for which it was made, will not vitiate it^h.

^z Bul. N. P. 272.—Bayl. 4. —¹ Burr. 227.—¹ Wils. 262.

^a Id.—Stra. 1271.

^c 5 T. R. 486.

^b Lord Raym. 67, 1362,

^f Kyd, 50.

1396.—Gilb. Rep. 93.

^g Lord Raym. 1545.

^e Kyd, 56.

^h 7 T. R. 733.—Sel. Ca.

^d 2 Stra. 1217.—¹ Stra. 24. 39, *et ante* 34.

When

When a promissory note is made by several, <sup>PART I.
CH. VII.</sup> and expressed "we promise to pay," it is a joint note only; but if a note is signed by several persons, and begins *I* promise, &c. it is several as well as joint¹. Of all the other requisites to a promissory note, as they are in general the same as to a bill of exchange, it will only be necessary to observe on the difference in the amount of the stamp on which the instrument is required to be written.

The *stamp* duties on promissory notes¹ seem to be divisible into three classes, namely, *first*, on those notes exceeding 200l. however payable; *secondly*, on those not exceeding 200l. payable otherwise than to bearer on demand; and, *thirdly*, on those not exceeding 200l. payable to bearer on demand.

1st, On those, however payable, if exceeding 200l.

£.	s.	d.
If above 200, a duty of	2	8

2dly, On those not exceeding 200l. payable otherwise than to bearer on demand:

£.	£.	s.	d.
If amount above 2 and to 30, a duty of		0	8
30	50,	1	0
50	100,	1	4
100	200,	2	0

3dly, On those not exceeding 200l. payable to bearer on demand. 1st, on notes payable to

¹ Peake, 130.—Stra. 76, Bla. Rep. 947.

819.—Lord Raym. 1544.—² See stat. 31 G. III. c. 25, Cowp. 832.—Burr. 2611.—s. 2.—37 Geo. III. c. 90, s. 1.

bearer

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bearer on demand, *re-issuable* after payment at the place where made :

	£.	s.		£.	s.		s.	d.
Amounting to	0	40,	and not exceeding	5	5,	a duty of	0	4
from	5	5,	-	-	30	0,	-	0 8
from	30	0,	-	-	50	0,	-	1 0
from	50	0,	-	-	100	0,	-	1 4
from	100	0,	-	-	200	0,	-	2 0

2dly, On notes payable to bearer on demand, and *re-issuable* after payment at any place :

	£.	s.		£.	s.		s.	d.
Amounting to	2	0,	and not exceeding	5	5,	a duty of	0	8
Exceeding	5	5,	and not exceeding	30	0,	do.	1	4

Bank notes are exempted from the stamp duty by the 23d Geo. III. c. 49, s. 9; and other subsequent statutes, in consideration of the payment of the annual sum of 12,000*l.* into the receipt of His Majesty's exchequer.

Though, as it has been already shewn, the law relative to the *transfer* of bills of exchange is in general applicable to the transfer of promissory notes, there is one instance in which a note differs from a bill, namely, in the *time* when a transfer of it may be made : for a bill, as we may remember, being once paid, cannot again be negotiated so as to raise any new contracts on it^k; but with respect to notes of a certain description, it is otherwise, it having been enacted¹, that notes payable to the *bearer on demand*, for any sum not exceeding *two hundred pounds*, and stamped

^k *Ante* 115.

¹ 31 Geo. III. c. 25, s. 7.

as before mentioned^m, may be *re-issued after payment* without a new stamp, provided the person who made and first issued or negotiated them, paid them at the place where they were first issued or negotiated. And it has also been enactedⁿ, that notes of the same description, *not exceeding thirty pounds*, may be *re-issued after payment*, without any new stamp, by whomsoever, or wheresoever they may have been paid.

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In all points in which a distinction between the case of bills of exchange and promissory notes has not been traced, the rules, as has been before observed, relative to the one, equally affect the others; it will not therefore be necessary to make any further observations in the present chapter.

^m *Ante* 176.ⁿ 31 G. III. c. 25, s. 8.

PART SECOND.

OF THE REMEDIES ON A BILL, CHECK, OR
NOTE.

IN the preceding part of this work, an attempt has been made to point out the nature of the legal RIGHT which may be acquired by the instruments which are the subject of this Treatise. The REMEDY which the law affords the holder to enforce payment, forms the other head of enquiry. In this part of the work no distinct observations on bills and notes will be necessary, as the same remedies are given by law on both species of instruments. The means of enforcing payment, are either by action of assumpsit, or debt, or, where the party liable is a bankrupt, by proof under the commission.

CHAPTER FIRST.

BY, AND AGAINST WHOM, AN ACTION OF ASSUMPSIT ON A BILL, CHECK, OR NOTE, MAY BE BROUGHT.

THE action of assumpsit is by far the most usual and most extensive remedy on bills, checks, and notes; indeed it is said, as will be seen hereafter, that it is the only remedy where no privity of contract exists between the parties, as for instance, between the indorsee and the acceptor of a bill and maker of a note. With respect to the persons by, and against whom, this action may be brought^a, it may be observed in general, that wherever a legal right is created, or liability imposed, through the medium of these instruments, that right may be asserted, and that liability enforced, by this action.

The holder of a bill, check, or note, may in general maintain an action thereon against all the parties to it, who became so previously to himself^b. Thus the payee may, in default of payment, sue the acceptor, whether he accepted as drawee, or merely for the honour of the bill, or of any of the parties to it; and he may also, in

^a Poth. tit. Contrat de *per totum*.
Change, part 1, chap. 5, art. 2, ^b 4 T. R. 471.

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such case, sue the drawer. An *indorsee* may not only sue the acceptor and drawer, but also all the indorsers from whom he derives his title ; and an assignee, becoming such by mere delivery, may sue the acceptor, drawer and indorsers, but he cannot maintain an action against any person whose name does not appear on the instrument, except the person who assigned it to him, and then only when the consideration of the transfer was a precedent debt, or a debt arising at the time, and not when he became the proprietor of the instrument by discounting it. The drawer may maintain an action on the bill against the drawee, in case of a refusal to accept or to pay ; and any party, having been obliged to pay it in consequence of the default of the drawee, in which case it is said he holds in his original capacity^c, may maintain an action against all the parties antecedent to himself. In the case of an acceptance for the accommodation of the drawer, the acceptor, if he has been obliged to pay, may sue the drawer on his implied contract, to indemnify him ; and a person not originally party to a bill, having paid it *supra protest*, may maintain an action against all or any of the parties to it, except the person whom he paid.

Unless, however, under special circumstances, which must be shewn on the record, no action can be maintained on a bill against a person who

^c 7 T.R. 571.—Lutw. 885, 888.

became

became party to it subsequent to the holder ; for if it were otherwise, the defendant in such action might, as an indorsee deriving from the plaintiff, be entitled to recover back again in another action against the plaintiff, the identical sum which he, the plaintiff, had previously recovered from him ; which would introduce a circuitry of action ; and therefore, where *A.* having declared on a promissory note against *B.* made by *C.* to *A.* indorsed by him to *B.* and by him again indorsed to *A.* and having obtained a verdict, the judgment was arrested^d. A plaintiff cannot maintain his action against the person from whom he received a bill, unless he gave him a valuable consideration for it^e. We have before seen, what objections may be raised to an action at the suit of a person attempting to derive an interest in a bill, by a transfer after it was due or paid ; and what *laches* in the holder of a bill, will operate as a forfeiture of his right of action. If the holder of a bill makes the acceptor his executor, and dies, the right of action against all the parties is extinguished^f.

Wherever a person has a remedy against several parties to a bill, he may, if he chuses, commence an action against each of those parties

^d 4 T. R. 470.

^e *Ante* 51.—7 T. R. 350, 571.—1 Lutw. 886.—10 Mod. 36.—1 Wils. 185.—4 Bro. P. C. 604, *acc.* 2 Bla. Com.

446, *contra.*

^f Poth. pl. 191.—1 Rol.

Ab. 922.—Plowd. 184, 543.

—Salk. 299.—2 Bla. Com.

511, 2.—3 Bla. Com. 18.

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CHAP. I.

at the same time; and an action commenced against one of them, will not preclude any other remedy against the others; but as the different persons liable on the bill are debtors to the holder in respect of the same debt, satisfaction by any one will discharge the others^g.

It seems to have been settled at a very early period, that when two persons were *severally* as well as jointly bound in a bond, and one of them was taken in execution in a separate action, the other might nevertheless be sued, because the taking of *another's* person in execution, is but a mere security for the payment of a debt, and not a valuable satisfaction of it^h. It was made a question in the last century, how far this doctrine was applicable to the case of bills of exchange; but it is now settled that a judgmentⁱ, or even an execution against the person of any one of the parties to the bill, will not discharge the others, though with respect to him it is a full satisfaction of the debt^j. It has also been decided, that the holder's letting a prior indorser in execution out of prison on a letter of license, would not discharge a subsequent indorser from his obligation to pay the bill^k; and that if an acceptor is discharged under the insolvent debtors' act, such discharge will not

^g Poth. pl. 160.—Hull v. 87.—2 Show. 494.—Lutw. Pitfield, 1 Wils. 46. 878, 882, S. C.

^h 5 Co. 86.

ⁱ Id *ibid*.

^j Claxton v. Swift, 3 Mod.

^k 2 Bla. Rep. 1235, *sed quære*.

operate

operate in favour of any other person¹: but it has been said, that if the holder of a bill accepts a bond from the drawer, in satisfaction of it, such act would discharge the other parties^m; and we have before seenⁿ, that compromising with the acceptor, without the assent of the drawer and indorsers, will release them from their engagements. Actual payment of what is due, will of course discharge the parties; and though the holder of a bill may sue out execution against the person of all the parties, he cannot issue a *fiere facias* to affect the goods of more than one°.

PART II.
CHAP. I.

¹ 4 T. R. 825.

^m 3 Mod. 87.

ⁿ *Ante* 155.

^o *Stra.* 515.

CHAPTER SECOND.

OF THE DECLARATION IN AN ACTION OF
ASSUMPSIT ON A BILL, CHECK, OR NOTE.

THE declaration in an action to enforce the payment of a bill, check, or note, may in general either be founded on the instrument itself, or on the consideration of it. In the latter case, the plaintiff declares on the common counts, or such of them as are appropriate. It is usual in all cases, if possible, to declare on the instrument itself, and to add such common counts as the evidence will support.

With respect to the declaration, or *count*, in which the *bill, check, or note, is set forth*, it varies in point of form, according to the parties by, and against whom, the action is brought. The form of it, with annotations and observations on its parts, is subjoined in the appendix. It was formerly usual to commence the declaration on a bill of exchange, with a statement of the custom of merchants relative to the validity of a bill, and that the parties to it were persons within the custom; but this mode of declaring has long been disused^a; and even a reference to the custom in

^a Lord Raym. 175.

any part of the declaration, has been adjudged to be unnecessary^b. In declarations on promissory notes, it is usual to state that the defendant became liable to pay by force of the statute of Ann, which renders these instruments negotiable^c. In stating the cause of action, there are four things to be principally attended to. *First*, the setting out of the instrument. *Secondly*, how the defendant became party to it; and his consequent contract. *Thirdly*, the mode by which the plaintiff derived his interest in, and right of action on, the instrument. And, *Lastly*, the breach of the defendant's contract. This alone, without any statement of a consideration, will be sufficient, a consideration being, as we have before seen, implied^d. And first, the instrument, of which a profert is never made, though it partakes, as has been already shewn, of some of the qualities of a specialty^e, should in general be stated in the declaration, as it was really made; and if there be a variance, it will be fatal^f. If, however, the rules of law prevent the instrument declared on from operating according to the words of it, it may in all cases, *ut res magis valeat quam pereat*, be stated to have been made in such manner as

^b Lord Raym. 1542, 88.—
Carth. 83, 269.—Lutw. 279.

^c 4 T. R. 155.

^d *Ante* 9.

^e Bunb. 243.—1 Sid. 386.—
5 Com. Dig. 743.—4 T. R.
338.

^f Bristow v. Wright, Doug.
667.—Cowp. 600.—3 T. R.
178, 335, 643.—4 T. R. 471,
611.—1 Pul. and Bos. Rep.
C. B. 7.

PART II.
CHAP. II.

the law will give effect to it, though there may be a verbal variation between that statement and the instrument itself^g. Therefore, in the case alluded to in a former part of the work, of a note whereby a man promised *never to pay* a sum of money, it was adjudged that it might be declared on as a promise *to pay*^h; and bills payable to the *order* of fictitious persons, may be declared on as payable *to bearer*, against every party aware of the factⁱ. It is not usual to state more of the bill or note declared on, than is necessary to entitle the plaintiff to recover^j.

It is incumbent on the plaintiff, in every declaration founded on a breach of contract, to shew the contract for the non-performance of which the action is brought, and consequently it is necessary to state in a declaration on a bill, how the defendant became party to it—whether by drawing, accepting, or transferring it; as that he “made,” “accepted,” “indorsed,” or “delivered” it, which allegations will be sufficient, although the defendant did not in fact do either of these acts himself, provided he authorized the doing of them; though, indeed, it is usual where the fact is so, to state that those acts were done by the procuration of the agent who was employed^k: and this statement of the defendant’s contract will suffice, without alledging

^g *Ante* 185, n. f.^h *Ante* 58.ⁱ *Ante* 58.^j *Bristow v. Wright*, Doug. 667.^k 1 H. B. 313.—6 T. R. 659.

that

that he made an express promise, as the law always implies and raises a promise where there is a legal liability¹. PART II.
CHAP. II.

A plaintiff who sues upon a bill, check, or note, must shew in his declaration a title to sue upon it, in the same manner as every other plaintiff must shew a sufficient title, to enable him to maintain the action which he brings^m. Thus, in an action by the assignee of a bill, it is necessary to shew that it authorizes a transfer, and he must also state that a transfer was made. In general, whatever forms a constituent part of the plaintiff's title, must be set out correctlyⁿ. But this rule is liable to similar exceptions to that which makes it necessary to set out the instrument as made; and he may set it out as in the case of a bill payable to the order of a fictitious person, according to the effect given to it by law^o. It has been decided, that a bill intended to have been made payable to *A.* that he might guarantee the payment to *B.*, but through ignorance or mistake, made payable to *B.* and by him indorsed to *A.* and then indorsed back by *A.* to *B.*, may be stated to have been made payable to *C.*^p, and that the payee of a bill or note payable to his own order, may state it to have been made payable to himself^q. An indorsee may declare against his immediate indorser, as

¹ Carth. 509.—Salk. 128.

—Hard. 486.

^m 4 T. R. 471.

ⁿ 3 T. R. 645.—1 H. B. 605, 6.

^o *Ante* 185.

^p 4 T. R. 470.

^q 2 Show. 8.

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CHAP. II.

on a bill of exchange made by the defendant, directed to the acceptor, and payable to the plaintiff, the act of indorsing being similar in its operation to that of making a bill^r. In general, however, the plaintiff's title is stated as warranted by the instrument itself, and if he claims as a remote indorsee, every indorsement is usually set forth: but where the first indorsement is in blank, and the plaintiff is apprehensive he will not be able to prove all the subsequent indorsements, it is usual to add a count, in which the plaintiff is stated to be immediate indorsee of the first indorser: but in such case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out of the bill previous to, or at the time of the trial^s; which may be done, notwithstanding there has been a subsequent indorsement in full^t. It is not necessary to alledge, as part of the plaintiff's title, that the instrument was delivered to him, as the allegation "that an indorsement was *made*," includes it". Where an acceptance is to pay when a certain event shall take place, it is necessary to alledge that it has taken place.

As part of the plaintiff's right of action, it is necessary to shew a breach of the contract: thus, where the action is against the drawer or indorser of a bill, he must shew that he presented the bill

^r 4 T. R. 149.^t *Ante* 118, n. u.^s *Peacock v. Rhodes, Doug.*
633.—*Holt*, 296.—*Kyd*, 206.^u 7 T. R. 596.

to the drawee for acceptance, or payment, who was either not to be found, or refused payment; he must also shew that the defendant had regular notice of such default.

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CHAP. II.

With respect to the *common counts*, it is proper to observe, that although it is not usual, where there is a bill or note, for the pleader to rely on them alone, yet they will in many cases supply the place of the count on the instrument itself; and the plaintiff will be at liberty to go into evidence of the consideration for which the instrument was given, and will recover on the common counts, in case he cannot substantiate in evidence the facts necessary to support the count on the instrument, or such count should be adjudged to be defective^v. Thus, where the plaintiff declared on a promissory note, and on a *quantum meruit* for work and labour, which was the consideration for which it was given, but the note not being duly stamped, and a verdict having been taken generally for the plaintiff, the defendant moved to enter a nonsuit—the court said, that although the note, not being stamped, could not be given in evidence, yet the plaintiff ought to have an opportunity of recovering on the other count, and accordingly a new trial was granted^w.—And in *Wilson v. Kennedy*^x, where the same point was determined, Lord Kenyon said, that a promissory note is not like a bond, which merges the de-

^v 3 T. R. 174. — 2 Show. 501.—Kyd, 58, 197.

^w 7 T. R. 241.
^x Esp. 245.

mand.

PART II.
CHAP. II.

mand. It has also been adjudged, that it is not necessary to declare on a promissory note, but that in an action for money lent, the same may be given in evidence: for the stat. 3 and 4 Ann, c. 9, which enables the plaintiff to declare upon the note, is only a concurrent remedy¹. The instrument itself, will in certain cases be evidence in support of the counts for money lent, paid, had and received, and that founded on an actual or supposed account stated; and those counts, where applicable, should therefore always be inserted in the declaration. The *count for money lent*, is proper to be added in an action at the suit of the *payee* of a bill of exchange against the drawer, and in an action at the suit of the payee of a promissory note against the maker; they being evidence of money lent by the payee to the drawer of the one, and maker of the other². It is also an appropriate count to be subjoined to the special one, in an action at the suit of the indorsee against his immediate indorser³. So a note in this form, “3d December, 1751, Then received of Mr. Harris the sum of nineteen pounds, on behalf of my grandson; which I promise to be accountable for on demand. Witness my hand, S. Heartback”—the grandson being an infant, was adjudged to be evidence in support of the count for money

¹ Bul. N. P. 137.—Stra. Mod. 380.—Burr. 1516, 1525.
719. —6 T. R. 123.

² Stra. 725.—Bayl. 95, ³ Kessebower v. Tims, B.
cites Lord Raym. 758.—12 R. E. 22 G. III, Bayl. 96, n. b.

lent.

lent^b. It is said that a bill or note is *prima facie* evidence of money paid by the holder, to the use of the drawer of the one, and maker of the other^c; and that a bill, when accepted, is evidence of money paid by the holder to the use of the acceptor^d: but in a late case, Lord Ch. Just. Eyre said, that the presumptions of evidence which a bill of exchange affords, have no application to the assumpsit for money paid by the payee, or holder of it, to the use of the acceptor; and that it must be a very special case which will support such an assumpsit^e. In the case of Cowley v. Dunlop^f, Lawrence J. expressed an opinion that the drawer of a bill, who is obliged to take it up after having negotiated it, is confined to his action on the bill to recover against the acceptor. If the drawee, without having effects of the drawer in his hands, accepts and pays the bill without having it protested, he may recover back the money in an action for money paid, laid out, and expended, to the use of the drawer^g. A bill, as well as a note^h, is *prima facie* evidence of money had and received by the drawer or maker to the use of the holderⁱ: an acceptance is also evidence of money had and received by the acceptor to the use of the holder^j. And according to

^b 1 Burr. 373.^c Bayl. 95.^d Id 96.^e 1 H. B. 602.^f 7 T. R. 572.^g 1 T. R. 269. — 7 T. R. 576.^h Vin. Ab. tit. Evid. A. B.

36. — 1 Salk. 283.

ⁱ Bayl. 95, cites Burr. 1516.^j Id 96, cites 3 T. R. 174, 182, et vide 1 Ventr. 153.—1 H. B. 239, *acc.* 1 H. B. 602, *semb. contra.*

the

PART II.
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the case of *Israel v. Douglas*^k, an acceptance is evidence of an *account stated* by the acceptor with the holder of the bill.

It is here proper to observe, that whenever the bill or note is not declared upon, it is not adduced in evidence as an instrument carrying with it the privileges it is otherwise entitled to, in respect of its bearing internal evidence of a consideration; but it is merely used as a piece of paper or writing, to found an inference only, in support of the money counts, which inference may be rebutted and destroyed by contradictory evidence on the part of the defendant; in which case the jury must draw from the whole of the evidence, the conclusion of fact, that so much money was lent, paid, or had and received, or that an account was stated^l.

^k 1 H. B. 239.

^l 2 Stra. 725.—1 H. B. 602.

CHAPTER THIRD.

PART. II.
CHAP. III.

OF PAYMENT OF DEBT AND COSTS—JUDGMENT
BY DEFAULT—AND THE PLEAS AND DE-
FENCE IN AN ACTION OF ASSUMPSIT ON A
BILL, &c.

WHEN the plaintiff has declared, the de-
fendant, if he has any defence, pleads; if
he has none, he compromises the action, by pay-
ing the debt and costs; or he lets judgment go by
default.

If the defendant is advised to settle the action
in the first instance, without incurring further ex-
pence, he may move the court in which the
action is brought, for a rule, calling on the
plaintiff to shew cause why, on payment of the
debt and costs, all further proceedings should not
be stayed: or he may apply to a judge for a sum-
mons to the same effect. If the holder of a bill
of exchange brings separate actions against the
acceptor, the drawer, and indorsers, at the same
time, the court will stay the proceedings in any
stage of the action against the drawer, or any one
of the indorsers, upon payment of the amount of
the bill, and the costs of that particular action;
but the action against the acceptor will only be
stayed on the terms of his paying the costs in all
the actions, he being the original defaulter*.

Sect. 1.—Of
staying pro-
ceedings on
payment of
the debt and
costs.

* 4 T. R. 691.—Stra. 515, acc. Bla. Rep. 749, contra.

PART II.
CHAP. III.Sect. 2.—Of
judgment by
default.

When the defendant has no defence, either on the merits or on the pleadings, and is not able to pay the debt and costs in the first instance, he usually suffers judgment to go by default, whereupon the plaintiff must, before he will be entitled to final judgment and execution, ascertain the amount of the debt, which is done either by referring it to the master, to compute the principal, interest, and costs, or by suing out a writ of enquiry.

Formerly there was no legal mode of ascertaining what was due in the case of judgment by default, in an action on a bill or note, except by a writ of enquiry; but of late years a practice has been introduced in the court of King's Bench and Common Pleas, of referring it to the master to compute the principal and interest due on a bill of exchange or promissory note^b; and where such method can be pursued, the court will censure the plaintiff's attorney for suing out a writ of enquiry. Where there was a demurrer to one count, on a bill of exchange, and judgment for the plaintiff, and a plea to other counts, on which issue was joined, the court of King's Bench referred it to the master, to see what was due to the plaintiff on the former^c. The court of Exchequer have refused to adopt this practice^d; and

^b Tidd, 485.—4 T. R. 275. was that of *Rushley v. Salmon*, 29 Geo. III. 1 H. B. 252, 528, 541.—
In 1 Anstr. Rep. 249, it is said that the first case where the court granted this rule,

^c 7 T. R. 473.

^d 1 Anstr. Rep. 249.

in the other courts, it is still necessary to sue out a writ of enquiry where the bill is payable in foreign money, the value of which can only be ascertained by a jury^c.

PART II.
CHAP. III.

When the plaintiff proceeds to ascertain the damages, by executing a writ of enquiry, he need only produce the bill, and it will not be necessary to prove it^f, for where the action is founded on the instrument itself, letting judgment go by default is an admission of the cause of action, and of the defendant's liability to the amount of the bill^g; and the only reason why the production of the bill is required, is to see whether or not any part of it has been paid^h: for the same reasons, the defendant will not be suffered to give in evidence any matter in defeasance of the actionⁱ.

The defences of which the defendant may avail himself in this action, are founded either on a mis-statement in the declaration, of the cause of action, or on some defect in the right of action itself. Those of the first description are taken advantage of by a general or special demurrer: by a general demurrer when the mis-statement is substantially bad, and by a special demurrer when it is only formally so. Defences arising from a defect in the right of action itself, are brought forward either in the shape of a special plea, or are

Sect. 3.—Of the pleas and defence.

^c 4 T. R. 493. — 5 T. R. 87.—Tidd, 485.

^f 3 T. R. 301.—Bul. N. P. 278.—Tidd, 494, and cases there cited.

^g 3 Wils. 155.

^h Per Buller J. 3 T. R. 301.—Tidd, 494, and cases there cited.

ⁱ 1 Stra. 612.—Tidd, 494.

PART II.
CHAP. III.

given in evidence under the general issue of non-assumpsit. They consist either of a denial that the plaintiff ever had cause of action, or admitting that he once had, of an assertion, that it is either suspended or extinguished. Those of the *first* description are also divisible into two heads, namely, those defences which deny that the instrument declared on was made, indorsed, or accepted, or that the defendant was party to it, and those which admit such facts, but alledge that the contract supposed to have been raised by them was void or voidable, on account of the incapacity of the defendant to contract, as in the case of infancy or coverture, or on account of the want of consideration, or the illegality of it, or on the ground of an improper presentment for acceptance, or some other laches of the holder, or the person from whom he attempts to derive an interest in the instrument; or, admitting there once existed a valid contract, alledge that it was performed by payment or otherwise; or if unperformed, that there was some legal excuse for the non-performance of it, as a release or parol discharge before breach. Defences of the *second* description, namely, those which admit that the plaintiff once had cause of action, but assert that it no longer exists, are either such as alledge that the plaintiff is under an existing disability to sue, by his being an outlaw, alien enemy, bankrupt, &c. or that the defendant is under a disability to be sued,

either

either by his being an insolvent debtor, bankrupt, &c. or that the action is discharged by an accord and satisfaction, arbitrament, release, which, we have before seen, may in the case of bills be by parol, former recovery for the same cause, tender, set-off, or the statute of limitations. PART II.
CHAP. III.

With respect to the mode of taking advantage of these defences, it is proper to observe, that all defences which in effect deny that a bill was made, or that the defendant or plaintiff was party to it, such as those which are founded on some defect in the instrument, apparent on the face of it, or on the ground that the supposed drawing, acceptance, or indorsement, do not amount to such act, cannot be pleaded, and can only be taken advantage of under the general issue of non-assumpsit to which they amount. But all defences which admit the existence of a contract, but alledge that it was never binding, or that if it was, it was either performed or discharged before breach, may be pleaded specially^j; though in general, matters which deny that the plaintiff ever had cause of action, are not pleaded, but are given in evidence under the general issue of non-assumpsit, which, as will be seen presently, puts the plaintiff on proof of his right of action: where, however, such defences lay more in the knowledge of the defendant than the plaintiff, as in the case of infancy and coverture, it is considered as fairer

^j 1 Salk. 394.—L. Raym. 88, 9.—Com. Dig. tit. Pleader, E. 14.

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CHAP. III.

practice to plead them in the first instance, or give notice of them to the plaintiff previous to the trial of the cause, as otherwise the plaintiff may be surprized by them at the trial; in which case the court will frequently grant a new trial, the expences of which may perhaps eventually fall on the defendant. Defences of the second description, which admit that the plaintiff once had a right of action, are usually pleaded; and a tender, set-off, bankruptcy, or insolvency of the defendant, and the statute of limitations, must *in all cases* be pleaded*.

* Tidd, 375.—1 Lord Raym. 153.

CHAPTER FOURTH.

OF THE EVIDENCE IN AN ACTION OF ASSUMPSIT ON A BILL, &c.

THE evidence which the plaintiff must adduce in support of his count, or declaration, in which the instrument on which his action is founded is set forth, may be considered with reference, *first*, to the facts which must be proved; and, *secondly*, to the manner of proving those facts.

With respect to the facts which must be proved, the evidence is in all cases governed by the pleadings, it being necessary to prove every thing that is put in issue, and no more. When the general issue of *non-assumpsit* is pleaded, the plaintiff must prove every material allegation in his declaration, the requisites of which have been already stated; but on an issue taken on a special plea, replication, or rejoinder, it is only necessary for him to prove the particular point referred to the jury, for whatever is not expressly denied, is admitted by the pleadings; and on the same principle, where the issue lies on the defendant, as where it is joined on the plea of infancy, it is not incumbent on the plaintiff to adduce any evidence in support of his declaration.

Sect. I.—Of the facts the plaintiff must prove.

PART II.
CHAP. IV.

Under the general issue, the plaintiff must prove that the *instrument* declared on was *made* as stated in the declaration, either in words, or that its legal operation was as therein described^a; he must also prove that the *defendant* became *party* to the bill as alledged in the pleadings^b. In an action against an acceptor, the plaintiff must prove that the defendant accepted the bill either verbally or in writing^c; and if the acceptance was made by an agent, that he was legally authorized by the principal^d. In an action against several acceptors, the hand-writing or acceptance of each must be proved^e, or that a partnership existed, and that an acceptance was made by one of them for himself and partners^f; and if the acceptance was conditional, the event on which the condition depends, must be proved to have taken place^g. In an action against a drawer or indorser, the hand-writing of the defendant^h, or a signature by his agent having power to contract for him, must be established in evidence; and where a person, transferring a bill by delivery only, is the defendant, the delivery must of course be proved. It will also be incumbent on the *plaintiff* to substantiate in evidence his *interest* in the bill, or in other words, how he became party to itⁱ. The payee, or the bearer of a bill originally payable

^a *Ante* 185, 6, *post*.^b *Ante* 186, *post*.^c *Ante* 76, 186.^d *Ante* 24.^e *Esp. Ca. N. P.* 135.^f *Ante* 27.—Peake, 16.^g *Ante* 79, 188.^h *Ante* 55, 6.ⁱ *Ante* 187.

to bearer, has in general only to prove the delivery of it to himself^j, though under suspicious circumstances, the plaintiff, when he claims as bearer only, and not as original payee, may be required to prove that he, or some intermediate person between him and the person who transferred it to him, took it *bona fide*, and gave a valuable consideration for it^k. An indorsee must, in an action against the acceptor, in general prove the handwriting of the first indorser, although the acceptance was made after sight of the indorsement^l, and notwithstanding the bill was payable to the drawer's own order, and indorsed by him^m. Where the first indorsement was in full, directing the acceptor to pay the bill to a certain person, the plaintiff must prove the indorsement of such indorseeⁿ; but where the first indorsement was in blank, it will be unnecessary in an action against the acceptor, to prove any of the subsequent indorsements, although they were in full^o. But in this case, in order to render the evidence correspondent to the count in the declaration, which states the plaintiff to be immediate indorsee of the first indorser, all the subsequent indorsements must be struck out of the bill previous to, or at the time of the trial^p. Where a bill is made

^j *Ante* 115, 6.^k Bayley, 116, *ante* 51.^l 1 T. R. 654. — Doug. 630, 653. — Peake, 225. — Esp. 180, *ante* 116, *acc.* Sayer, 223, *contra*.^m Peake, 20.ⁿ *Ante* 116.^o *Ante* 118.^p *Ante* 118.

payable

PART II.
CHAP. IV.

payable to the order of a fictitious person, it will not, in an action against any party aware of that fact, be necessary to prove an indorsement¹. In an action at the suit of an executor against the acceptor of a bill, on a promise laid to the testator, the plaintiff must prove that the defendant accepted the bill in the testator's life-time². And where a cash-note is the subject matter of a set-off to an action at the suit of the assignees of a bankrupt who issued it, the defendant must prove that the note came to his hands before the bankruptcy³.

Where a drawer or indorser is defendant, as each is liable only in default of payment by the acceptor, the plaintiff must, in order to shew the defendant's *breach of contract*, prove that he used due diligence to get the money from the acceptor⁴: thus he must, in certain cases, prove a presentment for acceptance⁵, and in general a presentment for payment⁶; and in case of a refusal to accept⁷, or pay⁸, a notice of the dishonour. In the case of a foreign bill, a protest for non-acceptance or non-payment, must also be proved⁹: however, the plaintiff may prove certain facts, which will excuse the non-observance of any of the above matters, as the drawers or indorsers having no effects in the hands of the

¹ *Ante* 187.² 12 Mod. 447.³ 6 T. R. 57.⁴ Comyn, 579, and the cases referred to in the note to the last edition, *ante* 188.⁵ *Ante* 67.⁶ *Ante* 130.⁷ *Ante* 86.⁸ *Ante* 158.⁹ *Ante* 90, 259.

drawee,

drawee, or a promise by the defendant to pay, PART II.
CHAP. IV.
after full notice of the plaintiff's laches^a.—

In an action against an indorser, it is not necessary to prove a demand of payment of the drawer^a.

An indorser having paid a bill, must, where he sues the acceptor, the drawer, or precedent indorser, prove that it was returned to him, and that he paid it^b; and where the acceptor of an accommodation bill sues the drawer, he must prove the hand-writing of the defendant, and payment by himself, or something equivalent to it, such as his being in prison under a *capias ad satisfaciendum*^c; and as the presumption of law raised by the acceptance is, that the acceptor has effects of the drawer's in his hands, it will be incumbent on him to prove the contrary. In an action by the drawer, who has been obliged to pay the bill, against the acceptor, it is necessary to prove the acceptance, the demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff; but for the above reason, it is not necessary to prove that the acceptor had in his hands effects of the drawer's^d.

It is here proper to remind the reader, that in case the plaintiff cannot substantiate his demand by evidence, in support of the count in his declaration on the bill, he may, as has been already

^a *Ante* 68, 87, 101, 132.

^c 3 Wils. 18.

^a *Stra.* 441.—*Comyn*, 579,

^d 10 *Mod.* 36, 37.—1 Wils.
185.

ante 99.

^b *Lord Raym.* 743.

shewn,

PART II.
CHAP. IV.

shewn^e, resort to the other counts, which are founded on the consideration of it.

Sect. 2.—Of
the manner
of proving
the facts.

The evidence which the plaintiff must adduce, considered with reference to the *manner* in which every material fact must be proved, is parol or written, each of which must be the best evidence the nature of the case admits of.

With respect to parol evidence, the admissibility of a witness who had been party to a bill or note, was, in a late case, much restricted: it was declared by Lord Mansfield and the other judges, in *Walton v. Shelley*^f, where the question discussed was the propriety of admitting an indorser of a note to prove that it was given on a usurious consideration, that it is a rule of law, founded on public policy, that no party who has signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument which he hath so signed, because every man who is a party to an instrument gives credit to it. But since this determination, it was decided by the majority of the court of King's Bench^g, that in an action at the suit of an indorsee of a bill against the acceptor, the payee is a witness competent to prove that the bill was *originally void*^h. And it has been adjudged, that in an action against the

^e *Ante* 189.

^f 1 T. R. 300, *et vide* 3 T. R. 36.

^g Kenyon Ch. J. Grose and Lawrence J.'s *acc.* Ashhurst J. *contra*.

^h 7 T. R. 601, *vide* Esp. 332.—Peake, 6, 52, 224, *acc.* Esp. 10, 85, 298.—Peake, 40.—Trials *per pais*, 502.—12 Mod. 345.—Holt, 297, *contra*.

maker of a note, the indorser is a good witness to prove it paid¹. In an action against the drawer of a bill, the acceptor may prove that he had no effects in his hands^j; and Lord Mansfield admitted the maker of a note to prove, in an action against an indorser, that the date had been altered^k. However, letters of an indorser, offered in evidence to impeach the indorsee's title, were rejected in an action against the maker of a note, although the indorsement was made after the note was payable^l: and it has been ruled, that a person whose name is on a bill as indorser, cannot be a witness to prove a property in it in himself, and that it was indorsed to the plaintiff without consideration^m: and from an old reporter it appears, that a person supposed to be the drawer of a bill, cannot without a release be called to prove that he did not draw itⁿ.

On the principle, that the plaintiff must adduce in support of his action the best evidence in his power, he must in general produce at the trial the *instrument* declared on, in proof of the allegation in the special count, that it was *made*. Where, however, the original bill is lost, it will be sufficient to produce a copy, or give parol evidence of its contents; and therefore, where the defendant tore his own note of hand, a sworn

PART II.
CHAP. IV.

¹ Peake, 6, 52.

^j Esp. 332.

^k Levy v. Essex,ittings Midd. post. M. T. 1775.

^l Esp. 10.

^m Esp. 85.

ⁿ 12 Mod. 345.—Holt, 297.
—Trials per pass, 502.

copy

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CHAP. IV.

copy was admitted as good evidence^o. But in these cases, sufficient probability must be shewn to the court, to satisfy them not only of the loss, but also that the original note was genuine, before the plaintiff will be suffered to read a copy, or give parol evidence of the contents^p: and it has been adjudged, that where the original note is in the hands of the defendant, the plaintiff must give him notice to produce it, or he will not be allowed to go into evidence of its loss or contents^q. In an action against an acceptor, or an indorser, where he accepted or indorsed the bill after it was complete, and he had seen it, the mere production of the instrument accepted or indorsed by him, will be sufficient evidence of its having been made, because such acceptance or indorsement admits the drawer's hand-writing^r; on which principle it has been adjudged, that even proof of the forgery of the drawer's hand-writing is no defence for the acceptor or indorser, in an action at the suit of a *bonâ fide* holder, if the defendant accepted or indorsed the bill after the drawer's name was subscribed^s. If, however, the acceptance or indorsement was made without sight of the bill, it will be incumbent on the plaintiff to prove the drawer's hand-writing, as evidence of the instrument having been made^t.

* Lord Raym. 731.

^p 1 Atk. 446.

^q Esp. 50.—Peake, 165.

^r Stra.. 442, 648, 946.—
Burr. 1354.—Bla. Rep. 390.

—1 Lord Raym. 444.—Salk.

127.—12 Mod. 244.—Holt,

117.—2 Barnard, Rep. B. R.

82.—7 T. R. 604, 612.

^s Id ibid.

^t Id ibid.

In an action against an acceptor, the fact of his being *a party to the bill* declared on, by having accepted it, must in general be proved by the witness who heard him accept, if it was a parol acceptance; and by production of the bill, and proof of the defendant's subscription, or that of his agent, if the acceptance was in writing. It has been adjudged, that a witness who had only seen the drawee write his name pending the action, for the purpose of shewing the witness his usual mode of subscribing his acceptance, and thereby to enable him to distinguish it from the pretended acceptance of the bill in question, was not admissible to prove the acceptance or the forgery of the defendant's hand-writing, because the defendant might write differently from his common mode through design^u. In general, the signature of a party to an instrument may be proved, in case better evidence cannot be had, by comparing it with any other hand-writing of such party^v; but with respect to bills, it has been adjudged, that the production of other bills proved to have been accepted by the defendant, is no evidence of an acceptance of the bill on which the action is brought^w; and that in an action by the indorsee of a bill payable to the drawer's own order, against the acceptor, the admission by the acceptance of the drawer's subscription, was not sufficient evi-

^u Esp. 14, 15.

R. 497.—Esp. 351.

^v Bul. N. P. 236.—1 Gilb.^w Esp. 14, 15.

Evid. by Loft, 53, 4.—4 T.

dence

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CHAP. IV.

dence of the first indorsement, because comparison of hands in these cases is not admissible^x. However, since these decisions, bills admitted by the plaintiff to have been accepted by the defendant, were suffered to be given in evidence, for the purpose of proving by dissimilarity of hand-writing, that the supposed acceptance of the bill on which the action was brought was a forgery^y. A confession by the drawee, of his acceptance, though it will not be sufficient evidence of an acceptance against any other party^z, will be conclusive against him^a, though it was made pending a treaty for a compromise^b. The payment of money into court generally, on the whole of the declaration, is also an admission of the defendant's signature^c; but an offer to pay a part as a compromise, is no evidence, because, as it has been frequently said by Lord Mansfield, men must be permitted to buy their peace without prejudice to them, if the offer does not succeed^d. In an action against the drawer or indorser of a bill, his signature may be proved by evidence of the same nature as that which may be adduced in proof of an acceptance^e.

With respect to the mode of proving the *plaintiff's interest in the bill*, if he claims as payee or

^x Peake, 20.

^y 1 Esp. 352.

^z 1 Barnes, 317.—Esp. 135.

^a Stra. 648, 1051.—12 Mod. 309.

^b Esp. 143.—Bul. N. P. 236.

^c 2 H. B. 374.—2 T. R.

275.—Esp. 347.

^d Bul. N. P. 236.—Gunn

v. Gullock, Westm. Sitting^g,
post. Trin. T. 1775.

^e 12 Mod. 309.

bearer,

bearer, the mere production of the bill, containing words authorizing a transfer by delivery, will, as it has been already observed, be in general sufficient; though indeed in certain cases, he will be put to prove what consideration he gave for the instrument^f. If the plaintiff claims by indorsement, he must in general prove the first indorsement^g, which is done by calling a witness to prove the indorser's hand-writing, in the same manner as the acceptor's hand-writing must be proved; and confession by any one of several indorsers not in partnership^h, will not be sufficient evidence of an indorsement, except against the party making such admissionⁱ. In an action by a drawer or indorser, who has been obliged to take up a bill in consequence of the acceptor's refusal to pay it, he should, if the acceptor be defendant, prove the payment by himself, by producing the bill with a receipt on the back of it^j; and as a general receipt is *prima facie* evidence that the bill was paid by the acceptor, the plaintiff must in such case be prepared with other evidence of payment by himself^k. In an action at the suit of an acceptor having paid an accommodation bill *supra protest*, against the drawer of it, it is presumed that the protest would be presumptive evidence of the

^f *Ante* 51, 201.^g *Ante* 201.^h Peake, 16.ⁱ Barnes, 317.—Esp. 15.^j Lord Raym. 742, *ante*

157.

^k Peake, 26, *ante* 157.

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plaintiff's having had no effects of the drawer's in his hands¹.

In proof of the *breach* of the defendant's *contract*, when it is necessary to prove a presentment to the acceptor for payment, and a refusal to pay, the protest will, in the case of a foreign bill, be sufficient evidence of those facts; but in the case of an inland bill, the bill itself must be produced^m. Where notice of non-acceptance or non-payment must be proved, a protest must, as we have already seen, be also proved, if the bill was foreignⁿ; the mere production of which, without shewing by whom it was made, will be sufficient^o; and in proof of notice of the dishonour of a bill having been given, it will be sufficient to shew that a letter containing information of the fact was put in the post^p, or left at the defendant's house^q; but to entitle the plaintiff to give such facts in evidence, he must give the defendant notice to produce the letter which was sent or delivered^r.

¹ *Ante* 163.

^m Beawes, pl. 220.—2 Molloy, c. 10, s. 25.—Bul. N. P. 270.—4 T. R. 175.—Skin. 272, pl. 1.

ⁿ 12 Mod. 345, *ante* 202.

^o *Id* *ibid.* Holt, 297.

^p 2 H. B. 509.—Poth. pl. 148.

^q Esp. 5.

^r Peake, 165.

CHAPTER FIFTH

OF THE VERDICT, AND DAMAGES, IN AN ACTION OF ASSUMPSIT ON A BILL, &c.

THE amount of the DAMAGES to which the plaintiff is entitled, necessarily depends on the liability of the parties to the instrument ; the nature of which liability has already been considered in that part of the work which treats of the drawing, acceptance, transfer, and dishonour of bills, and from whence it may be collected, that in general, the sum for which the bill is payable, may be recovered, and in certain cases, interest, and such expences as may have been occasioned by the dishonour of it.

With respect to the *principal money*, or that sum which is payable on the face of the bill or note, the plaintiff is in general only entitled to recover the sum actually due to him, and therefore a person having been paid the whole, cannot maintain an action as trustee for any of the other parties to the bill^a ; and if the plaintiff has been paid only a part, even by a person not party to the bill, he cannot recover more than the sum that remains

^a 1 Wils. 46.

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due to him^b; for a partial as well as a total satisfaction to the holder, enures to the benefit of all the parties liable on the bill. On the same principle, if the plaintiff has only given a consideration for part of the money for which the instrument was drawn^c, or the consideration which was to have been given by him has in part failed^d, he will only be entitled to such damages as he has really sustained. It is, however, reported to have been decided, that if a bill is drawn in the regular course of business, or for money really due from the drawee to the drawer, in such case an indorsee, though he has not given to the indorser the full value of the bill, may recover the whole sum for which it is payable, and be the holder of the overplus as a trustee for the indorser^e. Where a bill or note is payable by instalments, and it contains a clause, that on failure of payment of any one instalment, the whole shall become due, the holder is entitled to recover the whole amount of the sum for which it was given; but where the instrument does not contain such a clause, it is doubtful on the authorities, whether the holder can legally take a verdict for more than the instalment due. According to the case of Beckworth against Nott^f, and several other cases cited by Lord Loughborough, in giving the opinion of

^b Cowp. 571.—1 H. B. 88.
—Peake, 52, *acc.* 2 Wils. 162,
contra.

^c Peake, 61.—Esp. 261,
ante 51.

^d Peake, 216, *ante* 51, 2.

^e Esp. 261.

^f Cro. Jac. 505.—Jenk. 333.

the court in the case of *Rudder v. Price*^g, the plaintiff is entitled to the whole sum for which the note was given; but according to other cases, and particularly that of *Ashford v. Hand*^h, the plaintiff is only entitled to the instalments due at the time of commencing the action. Where, at the time of the trial, nearly all the instalments are due, the jury will frequently, for the sake of avoiding another action, give the whole sum in damages. If the plaintiff takes a verdict for more than he is entitled to recover, the court will either make him correct the verdict, and pay the costs occasioned by his misconduct, or grant a new trialⁱ.

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When *interest* is made payable by the instrument itself, there is no doubt of its being recoverable; and as, according to several cases^j, interest is in general payable on all liquidated sums from the instant the principal is due, it is recoverable on all bills of exchange and notes of hand payable at a day certain, or after demand, if payable on demand^k, for money lent^l, and for money paid; but not for goods sold, or work and labour^m. In some cases, it is said that interest is payable from the date of the note, as where it appeared on the face of it to have been given for money

^g 1 H. B. 551.

^h Andr. 370.

ⁱ 1 H. B. 88.—Cowp. 571.
—Bayl. 90, *acc.* 2 Wils. 262,
semb. contra.

^j 3 Wils. 265.—2 Bla. Rep.
761, S. C.—Burr. 1085.

^k Bla. Rep. 761.—Marius

13.—3 Wils. 265.—Bunb.

129.—2 T. R. 58.

^l Burr. 1077, *acc.* Sel. Ca.
Evid. 164, *contra.*

^m 1 H. B. 305.

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CHAP. V.

lentⁿ; but it is generally understood that a bill or note carries interest only from the time of the demand of payment, unless the delay was occasioned by the defendant, as by his being out of the kingdom at the time it was due^o: for interest being in the nature of damages for non-payment, it would be unreasonable to suffer the holder, by his own laches, to acquire a benefit, and to subject the drawer, acceptor, or indorser, to damages, when they were guilty of no default^p. On this principle it appears to have been decided^q, that interest is only payable from the time the protest was made. It has been observed, that a neglect to procure a protest upon any inland bill for the payment of 20*l.* or upwards, will perhaps preclude the holder from recovering such interest or expences from any person entitled to notice of the non-acceptance or non-payment; but it is clear that it will not preclude his recovering from any other person^r.

With respect to the time when interest stops, Lord Mansfield declared^s, that the general practice of the associates, in taking damages in cases where the debt carried interest, was to stop at the commencement of the action^t; which practice was not founded in law, but in mis-

ⁿ Prac. Reg. 357.^o 6 Mod. 138.—Poth. pl. 63, 64.^p *Ante* 133, Prac. Reg. 357.^q 9 Mod. 138.^r 10 Mod. 38.—2 Bla. Com. 469.^s Bayl. 91, cites 3 and 4 Ann, c. 9, s. 5.—Ld. Raym. 992.—6 Mod. 80.—Salk. 131.—Stra. 910.^t In Robinson against Bland, Burr. 1085.^u Prac. Reg. 357.

take and misapprehension; and that in point of justice, interest should be carried down quite to the actual payment of the money. But as that cannot be, it should be carried down to the time when the demand is completely liquidated, by the judgment being signed, by which means complete justice is done to the plaintiff, and the temptation to a defendant to make use of all the unjust dilatories of chicane, is taken away: for if interest were to stop at the commencement of the suit, where the sum is large, the defendant might gain by protracting the cause in the most expensive and vexatious manner.

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The only *expence* which the holder of a bill can be put to by the dishonour of it, is that of the charge for noting and protesting, and therefore he cannot demand more of any of the parties to the bill, than a satisfaction for that expence. But a party who has been obliged to pay the holder, in consequence of the acceptor's refusal, frequently is put to other expences by the return of the bill, such as re-exchange, postage, commission, and provision". *Re-exchange* is the expence incurred by the bill being dishonoured in a foreign country, in which it was payable, and returned to the country in which it was made or indorsed, and there taken up: the amount of it depends on the course of the exchange^v between the countries

^u 2 T. R. 52.

b. 2, l. 10, and Smith's

^v For the nature of ex- Wealth of Nations, 2d vol. 144, change, see Mont. Esp. L. 213, 234.

PART II.
CHAP. V.

through which the bill has been negotiated. It is said^w that the relative abundance or scarcity of money in different countries, is what forms the exchange between those countries. In the drawing of bills on a foreign country, the value of money in that country is the first thing to be enquired into: thus, for instance, supposing 71,000 livres tournois are worth 603l. 19s. 10d. English money sterling, and that an English merchant has sold goods of the value of 603l. 19s. 10d. to a Frenchman, who wishes to pay him for the same by a bill of exchange payable in France, the bill must of course be drawn for 71,000 livres tournois: if, at the time the bill is due, the exchange is in favour of France, and consequently the value of 71,000 livres tournois exceeds that of 603l. 19s. 10d. English money, and the bill is returned to this country, and the drawer, or an indorser, is called on to take it up, he may, as in the case of *Mellish v. Simeon*^x, be obliged to pay 309l. 4s. 5d. more than the amount of the bill, which sum forms what is called the re-exchange, and is, as it has been said, the difference between the draft and the re-draft^y. It appears that the drawer of a bill is liable for the whole amount of the re-exchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return, although pay-

^w *Ante* 215, n. v.^x 2 H. B. 378.^y *Amb. f.* 674.

ment of the bill was expressly prohibited by the laws of the country on which it was drawn². Between this country and India, it is not customary to make a distinct charge for re-exchange; but it has been the constant course with respect to bills returned protested from India, to allow at the rate of 10s. per pagoda, which includes interest, exchange, and all other charges^a. It appears from the case of Francis against Rucker^b, that the drawer and indorsers of bills drawn in Pennsylvania, on any person in Europe, and returned protested for non-payment to that country, are liable to the payment of 20l. per cent. advance. With respect to *provision*, it is said by Pothier^c, that it is usual for the holder of a bill to allow his agent, to whom he indorses it for the purpose of receiving payment for him, a certain sum of money called provision, at the rate of so much per cent. to recompense him not only for his trouble, but also, if such agent is a banker, for the risk he runs of losing the money he is obliged to deposit with his correspondents in different places, for the purpose of re-paying his principal the amount of the money received on the bills. And it is said, that a half per cent. is not an unreasonable allowance, whether the agent is a banker or not.

The charges above enumerated, are the only legal ones, nor can any extraordinary expences, or

² *Ante* 64.

^a 2 T. R. 52.

^b Amb. 672.

^c Pl. 86, 87, 88.

loss,

PART II.
CHAP. V.

loss, which the holder or other parties may be put to by travelling, or by some advantageous engagement being delayed or defeated by the want of punctual payment, be in any case legally demanded^d.

^d Love, 235, cites Lex Merc. 461.—Poth. pl. 63.

CHAPTER SIXTH.

OF THE ACTION OF DEBT ON A BILL, &c. AND
OF PROVING IT UNDER A COMMISSION OF
BANKRUPTCY.

THE remedy by *action of debt*, to enforce payment of a bill or note, and the *proof* of it *under a commission of bankruptcy*, remain to be considered in the present chapter.

The action of debt on simple contract was formerly much in use, but was afterwards disused on account of the law wager^a: it has lately revived, and is now become a common action for the recovery of money due on simple contract. The principal advantages arising from adopting this remedy, are, first, that the plaintiff need not execute a writ of enquiry after a judgment by default; and, secondly, that the defendant must, in all cases where the action is founded on a specific contract, as in the case of an action of debt on a bill of exchange, put in special bail, on bringing a writ of error^b. The action of debt on simple contract, cannot be maintained against executors or administrators^c, ex-

Sect. 1.—Of
the action of
debt on a bill
or note.

^a Gilb. on the Action of Debt, 363, 4.

^b Pul. and Bos. Rep. C. P. 249.

^c Plowd. 182.—1 Lev. 200.

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cept by custom in the city of London^d; and it has been adjudged^e, that debt on a bill of exchange cannot be brought by the payee against the acceptor; first, because no privity of contract exists between those parties^f; and, secondly, because in an action of debt on simple contract, the consideration which creates the debt or duty, ought to be shewn, which is not the case in a declaration on a bill; and an acceptance is only in the nature of a collateral promise or engagement to pay, which creates no duty^g: but it is presumed, that if this adjudication were re-considered, it would be decided differently; first, because it has been adjudged with respect to privity of contract, that if one man deliver money to another to pay over to a third person, the *cestui que use* may maintain an action of debt against the bailee to recover it^h; and the acceptance of a bill amounts to a promise in law, to pay the person in whose favour it is drawn the amount of itⁱ; and, secondly, because an acceptance is not a collateral engagement, nor is it similar to a promise by *A.* to pay the debt of *B.* if *B.* does not, an argument which was adduced in support of the doctrine: and lastly, because,

^d 8 Co. 126, a.

^e Hard. 485.—1 Wils. 185.
—1 Mod. 285.—Gilb. on the
Action of Debt, 364, *ante* 191.
—Com. Dig. tit. Debt, B.
acc. 12 Mod. 345.—Claxton
v. Swift, 2 Show. 482.—Bayl.
94, *contra*.

^f Rol. Ab. 597, pl. 4, 10.

—Dyer, 21, a.

^g 1 Salk. 125, pl. 5.—Vin.
Ab. tit. Bills, N.—1 H. B.
602.

^h Cro. Jac. 687.—2 Rol.
441, 597, l. 55.—Yel. 23.

ⁱ Lord Raym. 88.

wherever

wherever the common law or custom raises a duty, debt lies for it^j; on which ground, Twisden J. held that *indebitatus assumpsit* would lay on a bill of exchange at the suit of the payee against the acceptor^k. In *Rumball v. Ball*^l, the plaintiff recovered in an action of debt on a promissory note; and in another reporter it is said, that debt will lie against the maker of a note, but not against an indorser^m; but in *Welch v. Craig*ⁿ, it was held that debt would not lie upon a note; but as it has been observed, it does not appear by or against what particular party that action was brought^o.

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CHAP. VI.

The means which the holder has of obtaining satisfaction, where any of the parties liable to him on the instrument has become bankrupt, have been already so ably treated of by a gentleman to whose labours the public are highly indebted, that it will not be necessary in this Treatise to discuss the subject at large.

Sect. 2.—Of proving a bill or note under a commission of bankruptcy.

Since the statute 7 Geo. I. c. 31, and 5 Geo. II. c. 30, s. 22, the holder of a bill or note, whether due or not at the time of the bankruptcy, may in all cases, if *in possession of it at that time*, either be petitioning creditor in respect of it, or prove it under the commission; and even where it is not

^j Hard. 486.—Com. Dig. tit. Debt, A.—*Ld. Raym.* 88.
^k 1 *Ventr.* 152.—*Holt*, 296.
—12 *Mod.* 345.—*Skin.* 346,
acc. 1 *Freem.* 14.—1 *Mod.*

285.—1 *Ventr.* 152.—*Comb.* 204, *contra.*

^l 10 *Mod.* 38.

^m 1 *Mod. Ent.* 312, pl. 13.

ⁿ *Stra.* 680.—8 *Mod.* 373.

^o *Bayl.* 94, n. c.

due,

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CHAP. VI.

due, may receive a dividend of the bankrupt's estate in the same proportion as the other creditors, interest at the rate of 5l. per cent. only, being deducted for the time the bill or note has to run; and the bankrupt is in such case discharged from all liability on the instrument, in case he obtains his certificate, as much as if it had been due before the act of bankruptcy. It has been adjudged, that where a person has put his name to a bill or note, for the accommodation of another, and has another bill or note as a security for his having done so, in his possession at the time of the bankruptcy he may prove such bill, although he did not pay the accommodation bill until after the bankruptcy: for a bill or note is a legal security, creating an absolute debt at law, and consequently gives a right to prove, although the holder may not have sustained any damage at the time of such proof; the dividends being nevertheless withheld until it appears what damages he has sustained, and whether he has exonerated the bankrupt's estate from the payment of what he is himself liable^p.

It is difficult to collect from the cases, how far the holder of a bill or note, *not in his possession at the time* of the bankruptcy, is entitled to prove it under a commission against the acceptor or maker. It has been decided, that when a bill or note is drawn before, but indorsed after the secret act of

^p Cooke's Bkpt. Laws, 159, 366.—^z H. B. 570.—Esp. and cases there cited.—7 T. R. 134.

bankruptcy of the acceptor, to another person, PART II.
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 the indorsee, although he cannot set-off the amount of the sum payable, to any demand on him by the assignees, because the statute 5th G. II. c. 30, relates only to mutual debts due before the bankruptcy^a, yet he may be a petitioning creditor for the amount, or prove it under the commission, because he stands in the place of the person from whom he received the instrument; and the debt is not created by the indorsement, but by the acceptance of the bill, or by making the note^r: nor will the circumstance of a note being indorsed after it was due, make any difference^s.

It is also said, that when the holder of a bill or note proves it under the commission against the person who ultimately ought to pay it, before the indorser is called upon, such indorser has an equitable right to stand in the place of the holder, and receive the dividends upon his debt^t; and it seems that an indorser may, on the terms of bringing the amount of the sum payable into court, file a bill against the holder, to stay his proceeding at law against him, until he (the holder) has been before the commissioners to prove his debt, that he may thereby become, as it were, a trustee for the indorser^u: but this equity of the indorsee to stand in the place of the prin-

^a Cooke, 567.—Stra. 1234.

—1 T. R. 114.—6 T. R. 57.

^r Cooke, 19, 164, cites 1 Atk. 73.—2 Wils. 155, et

vide Stra. 744, n. l.

^s Bingley v. Maddison, B. R. Mich. T. 1783, Cooke 19.

^t Cooke, 153, 210, 211, and cases there cited.

^u Cooke, 211.

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principal creditor, is so far qualified, that he is not entitled to a dividend from the bankrupt's fund, to the prejudice of any other debt the principal creditor may have against the bankrupt's estate*. And according to what fell from Lord Kenyon Ch. J. in the case of *Cowley v. Dunlop*†, if the holder who has proved under the commission against the acceptor, has received dividends on the bill in the same proportion as the other creditors, an indorser who has afterwards been compelled to pay the sum remaining due on such bill, cannot come in and again prove the bill, because the same debt cannot be proved twice under the same commission.

Unless the holder whom an indorser has been obliged to pay, has proved before such payment, it seems doubtful whether or not the indorser can afterwards come in under the commission. According to some cases‡, he may, on the principle that the debt accrues by the acceptance; but in other cases, it has been decided, that the payment being after the bankruptcy, the indorser cannot prove, because, by paying the bill, he acquired a *new* cause of action against the acceptor, and at the time of the bankruptcy he had no demand against him§. The last case on this question;

* Cooke, 155, 211, cites 3 Vez. jun. 243.

† 7 T. R. 581, 2.

‡ Cooke's Bkpt. L. 19, 163, cites *ex parte* Brymer, *ex parte* Seddon, *ex parte* Tho-

mas, and *ex parte* Bingley v. Maddison, 7 T. R. 567 to 577.—Ambl. 672.

§ Cooke's Bkpt. L. 165, 202, 269.—1 H. B. 640.—4 T. R. 714.—Cowp. 525.—2 Stra.

tion, is that of *Cowley v. Dunlop*², in which the court of King's Bench was equally divided. The only circumstances necessary to be here stated, were as follows:—*A.* for the accommodation of *B.* accepted a bill drawn on him by *B.*; and *B.* in return, accepted a bill drawn on him by *A.*, and it was agreed that each party should pay his own acceptance. Both bills were negotiated. *B.* became a bankrupt: the bill accepted by him was proved by an indorsee under his commission, and a dividend was paid; *after* which *A.*, as drawer, was obliged to pay the residue remaining due on the bill accepted by *B.*, and as acceptor of the other bill, was obliged to pay that also. *B.* obtained his certificate, and the question was, whether such certificate discharged him from all liability to *A.*? It was argued by *Mr. J. Laurence*, that inasmuch as the payment by *A.* in discharge of the bill accepted by *B.* arose out of a transaction constituting a debt payable *in futuro*, anterior to the bankruptcy, *B.* was discharged: that if *A.* had never negotiated the bill accepted by *B.* there could have been no doubt but that he might have proved it under the commission against *B.*, and the circumstance of his having negotiated the bill, could not make any difference, for his situation was not worse than it would have been if he had not parted with the bill; for

2 *Stra.* 1160.—3 *Wils.* 16, *suynson v. Woodbridge*, *Doug.* 528.—2 *Bro.* 615.—1 *T. R.* 166.
599.—2 *Bla. Rep.* 840.—*He.* 2 7 *T. R.* 565.

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if the indorsee had returned the bill to *A.* he would have stood just in the same situation as if he had never parted with it, and might have proved it under *B.*'s commission, though he had not the bill in his possession at the time of the bankruptcy, as appears by the cases *ex parte* Brymer, and *ex parte* Seddon^a: and the indorsee having proved the bill under the commission, would not make any difference; for having done that, he could only call on *A.* for the deficiency beyond the dividend paid by *B.*, which was just what *A.* would lose if he had kept the bill and proved it himself, in which case the certificate would have discharged *B.*—*Mr. J. Grose* was of the same opinion, and urged that *B.* was discharged, because, although whilst the bill was in the hands of the indorsee, *A.*'s right therein was suspended, yet by his subsequent payment of it, he was remitted to his old right, which arose on the bill, and not on a fact collateral to it: that as to the cases of *Brooks v. Rogers*, and *Howis v. Wiggins*^b, the gentlemen in the court of Chancery conceived that those decisions were directly in opposition to their daily practice; and with respect to the case of *Brooks v. Rogers*, it was remarkable that the Lord Chancellor, who in 1791 determined that case as Chief Justice of the court of Common Pleas, so doubted of it, that upon re-considering it in the case *ex parte* Seddon, he over-ruled it, and permitted the

^a *Ante* 224, n. x.

^b *Ante* 224, n. y.

debt to be proved.—On the other hand, *Mr. J. Ashurst* insisted, that in this case there was no other consideration for the bills than the mutual acceptances, and it was part of the original agreement, that each was to pay his own, and therefore there could not be said to be any debt existing by or from either party, provided they had kept to their several stipulations; consequently no debt could arise but by failure of the parties: and it was laid down in *Chilton v. Whiffin*^c, that no debt can be barred, but what was contracted with certainty before the act of bankruptcy; that this was the common case, where the cause of action arises after the bankruptcy, though founded on a pre-existing ground; and therefore *B.* was not discharged by his certificate.—*Lord Kenyon Ch. J.* who was of the same opinion, said, that the case *ex parte Brymer*, and *ex parte Seddon*, relied on by *Mr. J. Laurence* and *Grose*, only proved, that though the indorser of a bill of exchange was not in possession of it at the time of the bankruptcy, yet if he gets possession under a person who had a legal title to it, he may come in and prove his debt under the commission, and he is then remitted to his former title; but his Lordship declared that he yielded to that proposition with this qualification, that the indorser has a right to call on the acceptor for payment, if the acceptor has not been called on by some person who had a better right

^c 3 Wils. 17.

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to require payment. In the present case, the estate of *B.* had paid a dividend on the bill to the indorsee, and the bill could never be proved again under the commission. But when *A.* as drawer, had been called on to pay the residue, another liability, as for money paid, arose, from which liability *B.* was not discharged by his certificate.

A bill or note of above six years standing, will support, or may be proved, under a commission, for the debt still exists; and no one but the holder can avail himself of the statute of limitations; but where the bankrupt himself applied to set aside the commission, on the ground that the petitioning creditor's debt was discharged by the statute of limitations, it was accordingly superseded^d. Wherever the holder of a bill or note would not, in the case of the solvency of a party to it, have been entitled to maintain an action against him, as where he has been guilty of laches, he cannot prove the amount of the instrument under a commission against such party^e.

When the holder of a bill is entitled to prove, he may do so, not only under the commission against the acceptor, but also under that against the drawer or indorsers; and he may at the same time maintain an action against any party to the bill, who is solvent^f. Where the person in pos-

^d Stra. 746, n. l.—1 T. R.
405.

^e Cooke, 167, 168.

^f Wilks v. Jackes, *cor.* Lord
Kenyon, 19 December, 1793,
Cooke, 168.

session of a bill or note, applies to prove it before he has received a part of the sum for which it was payable, he may prove for the whole amount under all the commissions, and receive a dividend out of each estate on his whole debt, provided he does not receive more than 20s. in the pound upon it, notwithstanding he has between such proof and the dividend, received a part of the amount from a solvent or other party to the bill^g; but if the holder has received a part antecedent to his application to prove, he can only prove the residue remaining due^h. If a person discounts bills for another, who afterwards becomes bankrupt, and the holder proves the aggregate amount of the bills, excepting them as a security, and any of the bills are afterwards paid in full, the amount of the bills paid must be deducted from the proof, and the future dividends be paid upon the residue of the debt onlyⁱ. And where bills have been given as a security for a general balance, or for a debt exceeding their amount, and upon a bankruptcy the creditor has proved the whole amount of his debt, excepting such bills, if any of them are duly honoured, or by any means fully satisfied, they must be taken as a payment *pro tanto*, and the future dividends made upon the residue of the debt^j. Although a bill or note is drawn by way of accom-

^g Cooke, 151, cites 1 Atk. 107, 9, *et vide* 2 Atk. 109.—
2 Vez. 113, *acc.* 2 P. W. 407,
contra.

^h *Id* *ibid*.

ⁱ Cooke, 155, and cases there cited.

^j Cooke, 119, 120, 156, and cases there cited.

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modation, yet the party holding it for a valuable consideration, is entitled to prove against all the parties but those from whom he received it, to the whole extent of it, and to receive the dividends, provided they do not amount to more than 20s. in the pound on the consideration which he gave^k.

It has been decided, that the costs and charges of protesting bills before an act of bankruptcy, may be proved; but that those accrued afterwards cannot^l; nor is the holder of a bill or note entitled to any interest accruing after the date of the commission issued^m; nor, where the act of bankruptcy is ascertained, to any accrued after the bankruptcyⁿ: but the creditor may prove the full sum for which the notes were given, notwithstanding he received 5l. *per cent.* discount^o. And where there is a surplus, the holder of a bill or note is entitled to interest, where it is payable on the face of the instrument, or there is other evidence of a contract to pay it^p.

A dividend of the bankrupt's estate having been declared by the commissioners, an action may be maintained by the holder of a bill for his share of the dividend against the assignees, if they refuse

^k Cooke, 157, and cases there cited.

ⁿ Bayl. 94.

^o Cooke, 173, 182.—1 Atk.

^l Cooke, 173.—Ambl. 672. 151.

² Bro. 597.—1 Atk. 140.

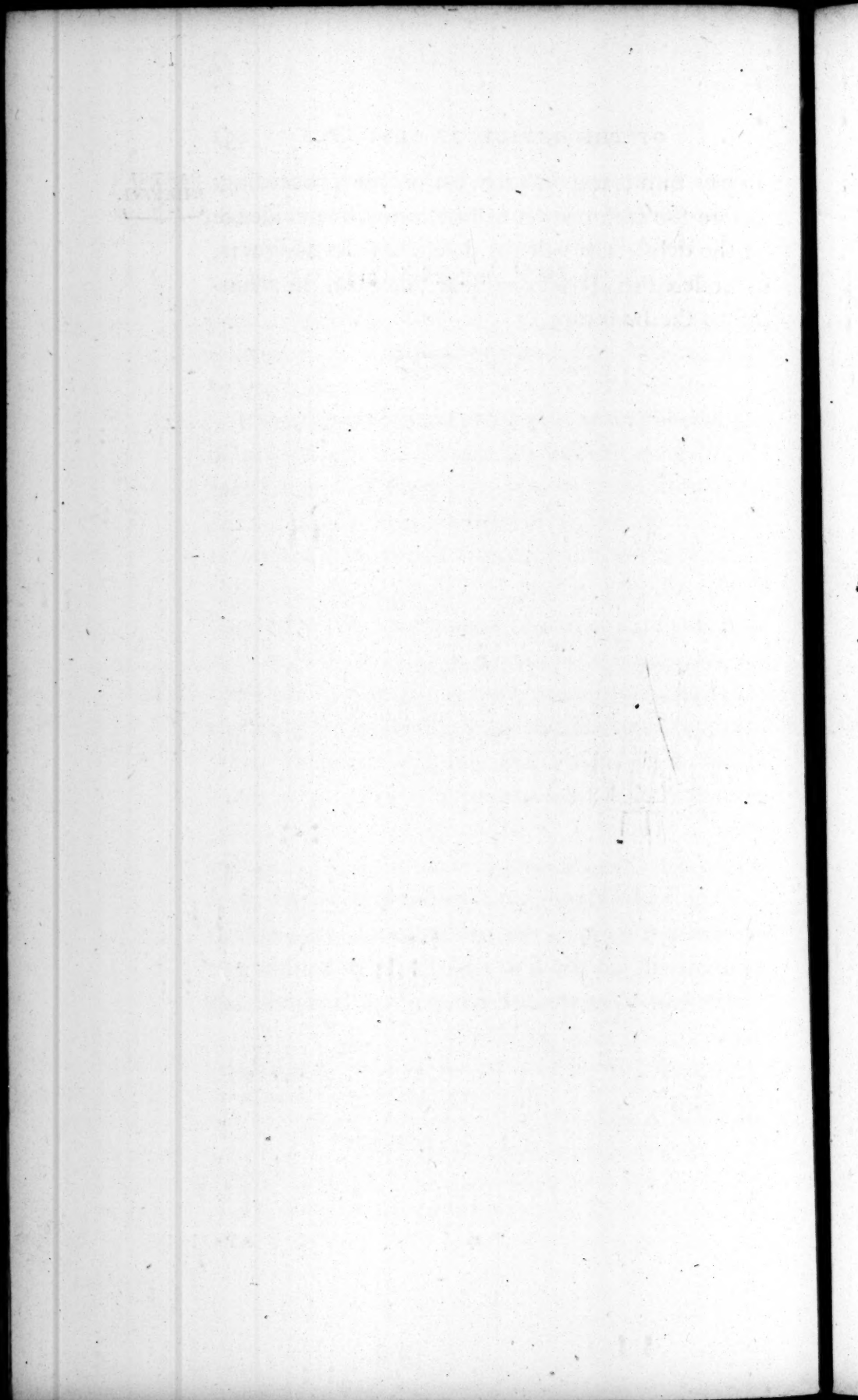
^p 2 Vez. jun. 295.—Cooke,

^m Cooke, 173, 181, 2.—1 Atk. 151. 535.

to pay him ; and in such action the proceedings before the commission will be conclusive evidence of the debt ; nor will the defendants, as assignees, be suffered to set-off any debt due from the plaintiff to the bankrupt^a.

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^a Brown v. Bullen, Doug. 407.



APPENDIX.

DECLARATIONS ON FOREIGN BILLS OF
EXCHANGE.*Way.**Hilary Term, in the 39th Year of
the Reign of King George the Third.*

— to wit. *A. B.* complains of *C. D.* being in the Declaration
custody of the Marshal of the Marshalsea of our Lord the at the suit of
now King, before the King himself: for that whereas the drawer
the said *A. B.* on the day of , in the year of our against the
Lord ^a, in parts beyond the seas, to wit, at acceptor.
is to say, at , in the county of ^b, according to the
usage

^a This should be the date of the bill, or if it has no date, the day it issued ;
or if that cannot be ascertained, the first day it can be proved to have existed.
(10 Mod. 311.—Stra. 22, *ante* 43).—If a bill has by mistake been dated dif-
ferently to the intention of the parties, the declaration should be as follows :
“ On, &c. (*the time intended*) at, &c. made, &c. bearing date by mistake
“ the day of , but meant and intended by the said *A. B.* to
“ be dated on the said, &c. aforesaid, and then and there directed, &c. by
“ which said, &c. he the said *A. B.* then and there requested, &c. to pay,
“ &c. after date (that is to say) after the said, &c. when the said
“ bill of exchange was so made, and meant, and intended to be dated (as afore-
“ said) to the order, &c.” and in the conclusion, the liability and promise to
pay, should be stated to be “ according to the tenor and effect, true intent and
“ meaning of the said bill of exchange.”—As to declarations on bills, the date
of which has been altered, *vide ante* 62.

^b The bill must be stated to have been made at the place where it bears
date, though the venue may be laid in another place for the purpose of trial
(Salk. 660.—Cowp. 178.—Mod. Ca. 228.—Com. Dig. tit. Action, N. 7.);
but

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usage and custom of merchants from time immemorial used and approved of^c, made his certain bill of exchange in writing^d, his own proper hand being thereunto subscribed^e, bearing date the same day and year aforesaid^f, and then and there directed the said bill of exchange to the said *C. D.* (by the name and addition of Mr. *C. D.*^g), by which said bill of exchange he the said *A. B.* then and there requested^h the said *C. D.* to pay after dateⁱ of that his first of exchange (second and third of the same tenor and date not paid), to the said *A. B.* or order^j, the

but the omission of the venue can only be taken advantage of by special demurrer.—16 and 17 Car. II. c. 8, s. 1.—4 Ann, c. 16, s. 1.

c This allegation has been adjudged to be unnecessary.—Lord Raym. 88, 175, 1542.—Carth. 83, 269, 270.—Lutw. 279, ante 184, 5.

d A bill made by an agent may be stated to have been made by the principal (12 Mod. 346, ante 186.—1 H. B. 313.—6 T. R. 659); but it is usual in such case to state, that “the said *A. B.* by one *E. F.* his agent in that behalf, on, &c. at, &c. made, &c.”

e This statement is unnecessary.—Lord Raym. 1376, 1484, 1542.—8 Mod. 307.—Stra. 512, 399.

f These words are superfluous.—2 Show. 422.

g The direction of the bill should be stated according to its legal effect; and it has been adjudged, that in an action against the acceptor on a bill directed to him, or in his absence, to *J. S.* the conditional direction to *J. S.* need not be stated (12 Mod. 447); and on the same principle, if a bill is directed to two, and accepted only by one, it need only be stated to have been directed to him.

h The bill is to be stated according to its legal operation (Burr. 323, 2611.—Cowp. 832.—Blacks. 947).—Thus, where the payee is a fictitious person, the bill may be stated to be payable to the person in whose favour the indorsement was made, or to bearer (Ante 187.—1 H. B. 313.—3 T. R. 182.—3 T. R. 481.—1 H. B. 569); and when a bill has through ignorance or mistake been made payable to a wrong person, it may be stated to have been payable to the proper one.—4 T. R. 470.

If the bill is payable at usance, the length of it must be shewn, as follows: at usance (that is to say, months after the date thereof).—Salk. 131.—3 Keb. 645.—Bayl. 108.

j If the bill is payable to the drawer's own order, it may be stated to have been payable to himself (2 Show. 8.); but the usual way is to state the bill to have been made as it really was, and to make an averment that the bill was not indorsed.

sum of ten pounds^k, for value received; which said bill of exchange he the said *C. D.* afterwards, to wit, on the same day and year aforesaid, at aforesaid, upon sight thereof, accepted according to the usage and custom of merchants^l: by means whereof, and according to the said usage and custom of merchants, he the said *C. D.* then and there became liable to pay to the said *A. B.* the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof^m. And being

^k Where the money in which the bill is payable is foreign, it is usual, though perhaps unnecessary (Bayl. 113.—1 Wils. 185.—4 Bro. Parl. Cas. 604), to make an averment at the end of the count on the bill, as follows: "With this, that the said *A. B.* will verify that the said 3900 livres tournois in the said bill of exchange mentioned, at the time of making the said bill of exchange, and also at the time the same was so presented and shewn for payment as aforesaid, were and still are of a large value, to wit, of the value of 153l. os. 5d. of lawful money of Great Britain, to wit, at Westminster aforesaid, in the county aforesaid."

^l This need only be stated in an action against the acceptor, or where the bill is payable after sight. Where the time of payment depends on the presentment, it should be the day of the presentment: in other cases, exactness as to the day is not material (Bayl. 106). It has, however, been adjudged, that if the plaintiff declares that the acceptance was before the day appointed for the payment, and that the defendant accepted to pay according to the tenor and effect of the bill, and it appears on the evidence, that the acceptance, in fact, was after the day of payment, the plaintiff could not recover (Lord Raym. 364.—12 Mod. 212); but it is said, that the propriety of this decision may be doubted (Bayl. 107). Where the bill is accepted payable at a particular place, it is thus stated: "accepted, &c. according to, &c. payable at . . ."—If the defendant accepted the bill by agent, the declaration may state the acceptance to have been made by the principal (12 Mod. 564, *ante* 186); but it usually runs as follows: "which said bill of exchange he the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, by one *E. F.* his agent in that behalf, upon sight thereof, accepted according, &c." In an action against an acceptor, a presentment for payment is never shewn, unless where he accepted it payable at a different place.—(*Ante* 134.)

^m This, though usually alledged, is unnecessary. In an action against the acceptor of a bill not payable on demand, instead of alledging that the defendant became liable, and promised to pay when he should be thereunto afterwards requested, he is stated to have become liable, and promised to pay according to the tenor and effect of the bill and acceptance, in the one case, and of the note in the other.—Bayl. 112.

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so liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at aforesaid, in aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereofⁿ.

Payee of a
foreign bill
against ac-
ceptor.

For that whereas one *E. F.* on the day of in parts beyond the seas, to wit, at , in the county of , according to the usage and custom of merchants from time immemorial used and approved of, made his certain bill of exchange in writing, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said bill of exchange to the said *C. D.* (by the name and addition of Mr. *C. D.*) ; by which said bill of exchange he the said *E. F.* then and there requested the said *C. D.* to pay after date of that his first of exchange (second and third of the same tenor and date not paid), to the said *A. B.* or order^o, the sum of ten pounds, for value received, and then and there delivered the said bill of exchange to the said *A. B.*, which said bill of exchange he the said *C. D.* afterwards, to wit, on the same day and year aforesaid, at, &c. aforesaid, upon sight thereof, accepted according to the usage and custom of merchants: by means whereof, and according to the said usage and

ⁿ This allegation has been adjudged to be unnecessary.—Carth. 509.—Salk. 128.—Hardr. 486, *ante* 187.

^o The plaintiff who claims as payee or indorsee, must in general shew that the bill was payable to bearer or order, or that it was otherwise assignable (*ante* 187) ; but if the bill was originally payable to the plaintiff, it will not be necessary to shew that it authorizes a transfer.—Rep. T. H. 288.—6 T. R. 123, *ante* 48.

^p This allegation is unnecessary.—7 T. R. 596.

custom of merchants, he the said *C. D.* then and there became liable to pay to the said *A. B.* the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof. And being so liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof.

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For that whereas one *G. H.* on the day of , 1st Indorsee
in parts beyond the seas, to wit, at , that is to say, against two
at , in the county of , according to the usage acceptors of
and custom of merchants from time immemorial used and a bill payable
approved of, made his certain bill of exchange in writing, after date.
his own proper hand being thereunto subscribed, bearing
date the same day and year aforesaid, and then and there
directed the said bill of exchange to the said *C. and D.*
(by their names, style, firm, and addition of Messrs.
C. and D. &c.) ; by which said bill of exchange he the said
G. H. then and there requested the said *C. and D.* to pay
after the date of that his first exchange (second and
third of the same tenor and date not paid), to one *E. F.*
(by the name and addition of Mr. *E. F.*) or order, the
sum of twenty pounds, for value received, and then and
there delivered the said bill of exchange to the said *E. F.*
which said bill of exchange the said *C. and D.* after-
wards, to wit, on, &c. at, &c. aforesaid, upon sight
thereof, accepted according to the said usage and custom
of merchants ; and the said *E. F.* to whom, or to whose
order, the payment of the said sum of money in the said
bill

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bill of exchange specified, was by the said bill of exchange to be made, after the making the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on, &c. aforesaid, at, &c. aforesaid^q, indorsed the said bill of exchange, his own proper hand being to such indorsement subscribed, according to the said usage and custom of merchants, by which said indorsement, he the said *E. F.* then and there ordered and appointed the said sum of money in the said bill of exchange specified, to be paid to the said *A. B.* and then and there delivered the said bill of exchange so indorsed as aforesaid, to the said *A. B.* of which said indorsement so made on the said bill of exchange as aforesaid, the said *C.* and *D.* afterwards, to wit, on &c. aforesaid, at, &c. aforesaid, had notice^r: by means whereof, and according to the said usage and custom of merchants, they the said *C.* and *D.* then and there became liable to pay to the said *A. B.* the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of their said acceptance thereof, and of the said indorsement so made thereon as aforesaid, and being so liable, they the said *C.* and *D.* in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *G. H.* to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of ex-

^q If the indorsement was made by an agent, the declaration usually runs as follows: "By one *Z.* as the agent, and by the procuration of and for the said *E. F.* indorsed the said bill of exchange, according to, &c."

^r On an indorsement for less than the full sum mentioned in the bill, the plaintiff must shew that the residue was paid (12 Mod. 213).—The words "or order," are generally here inserted, when the action is at the suit of a second or subsequent indorsee; but they are unnecessary: if, however, they are inserted, and the indorsement, on production of the bill, does not contain them, it will not vitiate the declaration.—Sel. Ca. on Evid. 126.

^s This allegation is said to be unnecessary.—Prac. Reg. 358.

change,

change, and of their said acceptance thereof, and of the said indorsement so made thereon as aforesaid.

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For that whereas the said *C. D.* on, &c. in parts beyond the seas, to wit, at _____, that is to say, at _____, in the county of _____, according to the usage and custom of merchants, made his certain bill of exchange in writing, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said bill of exchange to one *E. F.* (by the name and addition of Mr. *E. F. &c.*); by which said bill of exchange he the said *C. D.* then and there requested the said *E. F.* to pay, two months after date, that his first of exchange (second and third of the same tenor and date not paid), to the said *A. B.* (by the name and addition of Mr. *A. B.*) or order, the sum of thirty pounds, for value received, and then and there delivered the said bill of exchange to the said *A. B.* and the said *A. B.* in fact saith, that afterwards, and before the payment of the said sum of money in the said bill of exchange specified, or any part thereof, to wit, on, &c. at, &c. aforesaid, the said bill of exchange was presented and shewn to the said *E. F.* for his acceptance thereof, according to the said usage and custom of merchants; and the said *E. F.* then and there had sight of the said bill of exchange, and was then and there requested to accept the same^t, but that the said *E. F.*

Payee
against the
drawer of a
foreign bill
protested for
non-accept-
ance and
non-pay-
ment.

^t In a declaration against the drawer of a bill, on the ground of non-acceptance by the drawee, it is necessary to state, either that it was presented for acceptance; that the drawee could not be found; or some excuse for the neglect to present, or a promise to pay, after notice of the plaintiff's default (2 Show. 180.—Dougl. 654, 680). And under a declaration, stating that the bill was presented, and acceptance or payment refused, the plaintiff cannot give in evidence, that the drawee could not be found.—*Leeson v. Pigott*, Sittings after Trin. 1788, Bayl. 110, n. a.

did

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did not, nor would at the said time, when the said bill of exchange was so presented and shewn to him for his acceptance thereof as aforesaid, or at any time afterwards, accept the same, but wholly refused and neglected so to do; and thereupon the said *A. B.* afterwards, to wit, on &c. last aforesaid, at, &c. aforesaid, caused the said bill of exchange to be duly protested for non-acceptance thereof, according to the usage and custom of merchants^u. And the said *A. B.* in fact further saith, that afterwards, when the said bill became due and payable, according to the tenor and effect thereof, to wit, on the day of

, in the year aforesaid, the said bill of exchange was presented and shewn to the said *E. F.* for payment thereof, according to the said usage and custom of merchants, and the said *E. F.* was then and there requested to pay the said sum of money therein specified, according to the tenor and effect thereof; but that the said *E. F.* did not, nor would, at the said time when the said bill of exchange was so presented and shewn to him for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but wholly refused and neglected to do so; nor did he pay the said second and third of exchange in the said bill of exchange mentioned, or either of them^v; but therein wholly failed and made default. And thereupon the said *A. B.* afterwards; to wit, on the same day and year last aforesaid, at, &c. aforesaid, caused the said bill of exchange to be duly protested for non-payment thereof, according to

^u The plaintiff must either state that the bill was protested (*Solomons v. Stavelly*, Doug. 684, n. 144), or shew that it was not incumbent on him to protest it; as that the drawee had no effects of the drawer's in his hands; but the omission can only be taken advantage of by special demurrer (1 Salk. 131. —1 Show. 125.—Doug. 684, n. 144).—In stating the protest, if the plaintiff alleges that he protested the bill, or caused it to be protested, the declaration will be bad on special demurrer.—1 Show. 125.

^v This is not necessary to be alleged.—*Carth.* 509.

the

the said usage and custom of merchants; of all which said several premises the said *C. D.* afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid had *notice*^w; by means whereof, and according to the usage and custom of merchants, he the said *C. D.* then and there became liable to pay to the said *A. B.* the said sum of money in the said bill of exchange specified, when he the said *C. D.* should be thereunto afterwards requested; and being so liable, &c.

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w Where notice is requisite, this allegation is material.—Doug. 654, 689.

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DECLARATIONS ON INLAND BILLS.

Payee
against ac-
ceptor of an
inland bill.

FOR that whereas one *E. F.* on, &c. at, &c. according to the usage and custom of merchants from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said bill of exchange to the said *C. D.* (by the name and addition of *Mr. C. D. &c.*); by which said bill of exchange he the said *E. F.* then and there requested the said *C. D.* to pay after the date thereof, to the said *A. B.* (by the name and addition of *Mr. A. B.*) or order, the sum of , for value received; and then and there delivered the said bill of exchange to the said *A. B.* which said bill of exchange the said *E. F.* afterwards, to wit, on the same day and year aforesaid, at, &c. aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants: by means whereof, and according to the said usage and custom of merchants, he the said *E. F.* then and there became liable to pay to the said *A. B.* the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof; and being so liable, he the said *E. F.* in consideration thereof, afterwards, to wit, on, &c. aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof.

For

For that whereas the said *C. D.* on, &c. at, &c. according to the usage and custom of merchants from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said bill of exchange to one *E. F.* (by the name and addition of Mr. *E. F.* &c.); by which said bill of exchange he the said *C. D.* then and there requested the said *E. F.* to pay after the date thereof, to the said *A. B.* (by the name and addition of Mr. *A. B.*) or order, the sum of £. for value received, and then and there delivered the said bill of exchange to the said *A. B.* and the said *A. B.* avers that afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on, &c. aforesaid, at, &c. aforesaid, the said bill of exchange was presented and shewn to the said *E. F.* for his acceptance thereof, according to the said usage and custom of merchants; and the said *E. F.* was then and there requested to accept the same; but that the said *E. F.* did not, nor would at the said time, when the said bill of exchange was so presented and shewn to him for his acceptance thereof as aforesaid, or at any time afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but wholly refused and neglected so to do^a; whereof the said *C. D.* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, had notice: by means whereof, and according to the said usage and custom of merchants, he the said *C. D.* then and there became liable to pay the said sum of money in the said bill of exchange specified, when he the said *C. D.* should be thereunto afterwards requested; and being so liable, &c.

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DIX.

Payee
against
drawer,
drawee hav-
ing refused
to accept.

^a It is not necessary to alledge that an inland bill has been protested, *ante* 94, unless where the holder wishes to recover interest and costs, in which case a protest must be stated and proved.—Esp. Ca. Ni. Pri. 550.

APPEN-
DIX.

DECLARATIONS ON BANKERS' DRAFTS,

At the suit
of the *payee*
of a banker's
draft, against
the maker,
payment be-
ing refused
by the
drawee.

FOR that whereas the said *C. D.* on, &c. at, &c. according to the usage and practice of merchants, made his certain draft or order in writing, for the payment of money, commonly called a banker's draft, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said draft or order to certain persons commonly called and known by the names and using the style and firm of Messrs. (by their names, style and firm aforesaid); by which said draft or order, he the said *C. D.* then and there required the said to pay to the said *A. B.* (by the name and addition of Mr. *A. B.*) or bearer, £. and then and there delivered the said draft or order to the said *A. B.* and the said *A. B.* avers, that after the making of the said draft or order, and before the payment of the said sum of money therein specified, to wit, on, &c. aforesaid, at, &c. aforesaid, the said draft or order was presented and shewn to the said for payment thereof, according to the said usage and custom of merchants; and the said were then and there requested to pay the said sum of money therein specified, according to the tenor and effect thereof; but that the said did not, nor would, nor did, nor would, any or either of them, at the said time when the said draft or order was so shewn and presented to them for payment thereof, as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but wholly refused and neglected so to do, whereof the said *C. D.* afterwards, to wit, on, &c. aforesaid, at, &c. afore-

aforesaid, had notice: by means whereof, and according to the said usage and custom of merchants, he the said *C. D.* then and there became liable to pay to the said *A. B.* the said sum of money in the said draft or order specified, when he the said *C. D.* should be thereunto afterwards requested; and being so liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said draft or order specified, when he the said *C. D.* should be thereto afterwards requested.

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DIX.

For that whereas the said *C. D.* on, &c. at, &c. according to the usage and practice of merchants, made his certain draft or order in writing, for the payment of money, commonly called a banker's draft, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said draft or order to certain persons, commonly called or known by the names and using the style and firm of by which said draft or order, he the said *C. D.* then and there requested the said to pay to one *E. F.* (by the name and addition of Mr. *E. F.*) or bearer *£.* and then and there delivered the said draft or order to the said *E. F.* and the said *E. F.* to whom, or to the bearer of the said draft or order, the payment of the said sum of money therein specified, was by the said draft or order to be made, after the making of the said draft or order, and before the payment of the said sum of money therein specified, to wit, on, &c. aforesaid, at, &c. aforesaid, for a good and valuable consideration, assigned over and delivered the said draft or order to the said *A. B.* who thereby then and there became and was, and from thence hitherto hath been and still is, the bearer thereof, and entitled to the money therein specified. And the said *A. B.* avers, that after making of the said, &c. [*as in the preceding count.*]

At the suit of
the bearer of
a banker's
draft against
the maker,
drawees
having re-
fused pay-
ment.

APPEN-
DIX.

DECLARATIONS ON PROMISSORY NOTES.

Payee of a
promissory
note against
the maker.

FOR that whereas the said *C. D.* on, &c. at, &c. made his certain note in writing, commonly called a promissory note, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *A. B.* by which said note he the said then and there promised to pay after the date thereof, to the said *A. B.* (by the name and addition of Mr. *A. B.*) or order, the sum of £. for value received : by means whereof, and by force of the statute in such case made and provided, he the said *C. D.* became liable to pay to the said *A. B.* the said sum of money in the said note specified, according to the tenor and effect of the said note ; *and being so* liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on, &c. aforesaid at, &c. aforesaid, undertook, and then and there faithfully promised the said to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note.

1st Indorsee
of a promissory
note against the
maker.

For that whereas the said *C. D.* on, &c. at, &c. made his certain note in writing, commonly called a promissory note, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to one *E. F.* by which said note he the said *C. D.* then and there promised to pay after the date thereof to the said *E. F.* (by the name and addition of Mr. *E. F.*) or order, the sum of £. for value received ; and the said *E. F.* to
whom,

whom, or to whose order, the payment of the said sum of money in the said note specified, was by the said note to be made, after the making of the said note, and before the payment of the said sum of money in the said note specified, to wit, on, &c. aforesaid, at, &c. aforesaid, indorsed the said note, his own proper hand being to such indorsement subscribed, by which said indorsement he the said *E. F.* then and there ordered and appointed the said sum of money in the said note specified, to be paid to the said *A. B.* and then and there delivered the said note so indorsed as aforesaid, to the said *A. B.* of which said indorsement so made on the said note as aforesaid, the said *C. D.* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, had notice: by means whereof, and by force of the statute in such case made and provided, he the said *C. D.* became liable to pay to the said *A. B.* the said sum of money in the said note specified, according to the tenor and effect of the said note, and the said indorsement so made thereon as aforesaid. And being so liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said indorsement so made thereon, as aforesaid.

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For that whereas one *E. F.* on, &c. at, &c. made his certain note in writing, commonly called a promissory note, his own proper hand being thereunto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *C. D.* by which said note he the said *C. D.* then and there pro-

Indorsee
against in-
dorser, ma-
ker having
refused pay-
ment.

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mised to pay after the date thereof to the said *C. D.* (by the name and addition of Mr. *C. D.*) or order *£.* for value received; and the said *C. D.* to whom, or to whose order, the payment of the said sum of money in the said note specified, was by the said note to be made, after the making of the said note, and before the payment of the said sum of money in the said note specified, to wit, on, &c. aforesaid, at, &c. aforesaid, indorsed the said note, his own proper hand being to such indorsement subscribed, by which said indorsement he the said *C. D.* then and there ordered and appointed the said sum of money in the said note specified, to be paid to the said *A. B.* and then and there delivered the said note so indorsed as aforesaid, to the said *A. B.* and the said *A. B.* in fact saith, that afterwards, when the said note became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, the said note so indorsed as aforesaid, was presented and shewn to the said *E. F.* for payment thereof; and the said *E. F.* then and there had notice of the said indorsement so made thereon as aforesaid, and was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said note, and the said indorsement so made thereon as aforesaid; but that the said *E. F.* did not, nor would, at the said time when the said note was so presented and shewn to him for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but wholly refused and neglected so to do: of all which said several premises the said *C. D.* afterwards, to wit, on, &c. last aforesaid at, &c. aforesaid, had notice: by means whereof, and by force of the statute in such case made and provided, the said *C. D.* became liable to pay to the said *A. B.* the said sum of money in the said note specified, when he the said *C. D.* should be thereunto afterwards

wards requested; and being so liable, he the said *C. D.* in consideration thereof, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A. B.* to pay him the said sum of money in the said note specified, when he the said *C. D.* should be thereunto afterwards requested.

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JUDGMENTS IN ASSUMPSIT ON A BILL, &c.

Judgment
for plaintiff,
on demurrer
to a replica-
tion of *nul
tiel* record,
to a plea of
judgment re-
covered, to a
declaration
on a bill of
exchange,
and the mo-
ney counts,
with *aremit-
titur damna*
to the mo-
ney counts,
and judg-
ment for
plaintiff on
the 1st count
for the prin-
cipal and in-
terest on the
bill, on a
suggestion
founded on
the bill's
having been
referred to
the master
to compute
principal and
interest due
thereon.

*As yet of Trinity Term, in the
36th year of the reign of King
George the Third, witness
Lloyd Lord Kenyon.*

Middlesex to wit.—*A. B.* puts in his place ———, his attorney, against *C. D.* in a plea of trespass on the case, upon promises.

Middlesex to wit.—The said *C. D.* puts in his place ———, his attorney, at the suit of the said *A. B.* in the plea aforesaid.

Middlesex to wit.—Be it remembered, that, &c. [here copy the demurrer book, containing declaration on a bill of exchange and money counts, plea, judgment recovered, replication, *nul tiel* record, demurrer thereto in joinder, demurrer and award of *curia advisari vult.*]

At which day, before our said Lord the King, at Westminster, come as well the said *A. B.* by his attorney aforesaid, as the said *C. D.* by his attorney aforesaid; and whereupon all and singular the premises being seen, and by the court of our said Lord the King now here fully understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea of the said Robert, by him in manner and form aforesaid in reply pleaded, and the matters therein contained, are sufficient in law for him the said *A. B.* to have and maintain his aforesaid action thereof against the said *C. D.* Wherefore the said *A. B.* ought to recover against the said *C. D.* his damages,
by

by reason of the premises^a. And hereupon the said *A. B.* freely here in court, remits to the said *C. D.* all damages sustained by reason of the not performing of the several promises and undertakings in the four last counts of the said declaration mentioned; therefore let the said *C. D.* be thereof acquitted. And because it is suggested and proved, and manifestly appears to the said court here, that the said *A. B.* hath sustained damages by reason of the not performing of the said promise and undertaking in the said first count of the said declaration mentioned, to 50l. 12s. 6d. besides the costs and charges of this suit; therefore it is considered that the said *A. B.* do recover against the said *C. D.* the sum of 50l. 12s. 6d. for his damages last aforesaid; and also 21l. 7s. 6d. for the said costs and charges by the said court here adjudged to the said *A. B.* by his assent, which said damages, costs and charges, in the whole amount to 72l. and the said *C. D.* in mercy, &c.

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Judgment
signed the
17th day of
June, 1796.

Mercy.

^a If final judgment was signed of a different term to that in which interlocutory judgment was signed, here follows an award of a *venire* and return thereto, that *vice comes non misit breve*.

NOTARY'S FEES OF OFFICE, AS SETTLED THE
FIRST OF JULY, 1797.

At a meeting of several Notaries of the city of London, held at the George and Vulture tavern, in London aforesaid, on the 1st July, A. D. 1797, the following resolutions were unanimously agreed to, and since approved and confirmed by the Governor and Company of the Bank of England.

First—That from and after the fifth day of the present month of July, the *noting* for all bills drawn upon, or addressed at the house of any person or persons residing within the ancient walls of the said city of London, shall be charged one shilling and six-pence; and without the said walls, and not exceeding the limits hereunder specified, the sum of two shillings and six-pence.

Second—For all bills drawn upon, or addressed at the house of any person or persons residing beyond Old or New Bond-street, Wimpole-street, New Cavendish-street, Upper Mary-bone-street, Howland-street, Lower Gower-street, lower end of Gray's-inn-lane (and not off the pavement), Clerkenwell church, Old-street, Shoreditch church, Brick-lane, St. George's in the East, Execution-dock, Wapping, Dock-head, upper end of Bermondsey-street (as far as the church), end of Blackman-street, end of Great Surrey-street, Blackfriars-road (as far as the Circus), Cuper's-bridge, Bridge-street, Westminster, Arlington-street, Piccadilly, and the like distances, three shillings and six-pence; and off the pavement one shilling and six-pence per mile additional.

Third

Third—For *protesting* a bill drawn upon, or addressed at the house of any person or persons residing within the ancient walls of the said city (including the stamp-duty of four shillings, and exclusive of the charge of noting), the sum of six shillings and six-pence; and without the ancient walls of the said city, including the like stamp-duty, and exclusive of the said charge of noting, the sum of eight shillings, agreeable to the second article.

Fourth—That *all acts of honour* within the ancient walls of the said city of London, shall be charged the sum of one shilling and six-pence upon each bill; and for all acts of honour without the ancient walls of the said city, to be regulated agreeable to the charge of noting bills out of the city; and the like charge for any additional demand that may be made upon the said bill, or when the same is mentioned and inserted in the answer in the protest.

Fifth—For every *post demand and act thereof*, within the ancient walls of the said city, the sum of two shillings and six-pence; and without the walls of the said city, the sum of three shillings and six-pence (provided the same be only registered in the notary's books), and so in proportion according to the distance, to be regulated agreeable to the charge of noting bills.

Sixth—For every *copy of bill paid in part, and a receipt at foot of such copy*, shall be charged two shillings; and so in proportion for every additional bill so copied (exclusive of the receipt stamp.)

Seventh—For every *duplicate protest of one bill* (including four shillings for the duty), shall be charged the sum of seven shillings and six-pence; and so in like proportion of three shillings and six-pence (exclusive of the duty), for every additional bill.

Eighth

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Eighth.—For every folio of *ninety words*, translated from the French, Dutch, or Flemish, into English, shall be charged one shilling and six-pence; and from English into French, Dutch, or Flemish, two shillings for each such folio; and from Italian, Spanish, Portugueze, German, Danish, and Swedish, one shilling and nine-pence per folio of ninety words; and from Latin two shillings and six-pence per folio; and for *attesting the same* to be a true translation, if necessary, seven shillings and six-pence, exclusive of fees and stamps.

Ninth.—That all *attestations to letters of attorney, affidavits, &c.* at the request of any gentleman in the law, shall be charged seven shillings and six-pence, exclusive of fees, stamps and attendance.

Tenth.—For every *city seal* shall be charged one guinea for one deponent, exclusive of attendance and exemplification; and if more than one deponent, ten shillings and six-pence for each additional affidavit.

Eleventh.—For all *notarial copies*, shall be charged six-pence per folio of seventy-two words, exclusive of attestation, stamps, &c.

STATUTES RELATIVE TO SMALL NOTES AND
BILLS MADE OR NEGOTIATED IN ENGLAND.

By 15 Geo. III. c. 51, s. 1, entitled, "An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum, within that part of Great Britain called England," and made perpetual by 27 Geo. III. c. 16,—“Whereas various notes, bills of exchange, and drafts for money for very small sums, have for some time past been circulated or negotiated in lieu of cash within that part of Great Britain called England, to the great prejudice of trade and public credit; and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, labourers, and others, cannot comply with otherwise than by being subject to great extortion and abuse;” Be it therefore enacted, that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of any sum or sums of money less than the sum of *twenty shillings* in the whole, which shall be made or issued at any time from and after the 24th day of June 1775, shall be, and the same are hereby declared to be, absolutely void, and of no effect. By the 2d section, the person publishing or uttering any such notes, &c. is subjected to the penalty of 20*l*.

By 17 Geo. III. c. 30, s. 1, made perpetual by 27 Geo. III. c. 16,—“Whereas the said act (meaning 15 Geo. III. c. 51,) hath been attended with very salutary effects, and in case the provisions therein contained
“ were

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“ were extended to a further sum (but yet without pre-
“ judice to the convenience arising to the public from the
“ negotiation of promissory notes and inland bills of ex-
“ change for the remittance of money in discharge of *any*
“ *balance of account or other debt*), the good purposes of the
“ said act would be further advanced ;” Be it therefore
enacted, that all promissory or other notes, bills of ex-
change, or drafts, or undertakings in writing, being
negotiable or transferable, for the payment of *twenty shil-
lings, or any sum of money above that sum, and less than*
five pounds, or on which twenty shillings or above that
sum, and *less than five pounds, shall remain undischarged*, and
which shall be issued, within that ‘part of Great Britain
called England, at any time after the 1st of January, 1778,
shall specify the names and places of abode of the persons
respectively to whom, or to whose order, the same shall
be made payable, and shall bear date before or at the
time of drawing or issuing thereof, and not on any
day subsequent thereto, and shall be made payable with-
in the space of twenty-one days next after the day of the
date thereof; and shall not be transferable or negotiable
after the time thereby limited for payment thereof;
and that every indorsement to be made thereon shall be
made before the expiration of that time, and bear date
at, or not before the time of making thereof; and
shall specify the name and place of abode of the person or
persons to whom, or to whose order, the money contained
in every such note, bill, draft, or undertaking, is to
be paid; and that the signing of every such note, bill,
draft, or undertaking, and also of every such indorse-
ment, shall be attested by one subscribing witness at the
least; and which said notes, bills of exchange, or drafts,
or undertakings in writing, may be made or drawn in
words to the purport or effect as set out in the schedule
hereunto

hereunto annexed, No. 1 and 2. And that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum, or less than five pounds; or in which twenty shillings, or above that sum, and less than five pounds shall remain undischarged, and which shall be issued within that part of Great Britain called England, at any time after the said 1st day of January, 1778, in any other manner than as aforesaid; and also every indorsement on any such note, bill, draft, or undertaking, to be negotiated under this act, other than as aforesaid, shall, and the same are hereby declared to be, absolutely void; and the person publishing, uttering, or negotiating them, is subject to the penalty of 20l.

APPENDIX.

SCHEDULE,

No. 1.

(Place) (Day) (Month) (Year)

" Twenty-one days after date, I promise to pay to A. B. of (place) or his order, the sum of for value received by

" Witness, E. F.

C. D.

And the indorsement, toties quoties.

(Day) (Month) (Year)

" Pay the contents to G. G. of (place) or his order

" Witness I. K.

A. B."

No. 2.

(Place) (Day) (Month) (Year)

" Twenty-one days after date, pay to A. B. of (place) or his order, the sum of value received as advised by

" To E. F. of (place)

" Witness G. H.

C. D.

And the indorsement, toties quoties.

(Day) (Month) (Year)

" Pay the contents to I. H. of (place) or his order

" Witness L. M.

A. B."

By 37 Geo. III. c. 28, it is enacted, " that all promissory notes, and other notes, for payment of money, which since the 2d day of March one thousand seven hundred and

R

" ninety-

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“ ninety-seven, have been, or which hereafter shall be
 “ *issued by the governor and company of the Bank of Eng-*
 “ *land, payable to bearer,* notwithstanding the same shall
 “ have been, or shall be, made and issued for the pay-
 “ ment of any sum of money *under the sum of five pounds,*
 “ shall be good and valid in the law, to all intents and pur-
 “ poses, in like manner as if the same had been made and
 “ issued for the sum of five pounds, or upwards; and no
 “ person concerned, or who has acted in, or who shall or
 “ may be concerned or act in, the making, uttering, pub-
 “ lishing, or negotiating, such notes, shall be subject or
 “ liable to any penalty or forfeiture whatsoever in respect
 “ thereof.”

By 37 Geo. III. c. 32^a—Whereas it is expedient that the said acts (15th and 17th Geo. III.) should be *suspended* for a certain time, so far as the same may relate to any notes, drafts, or undertakings, made payable on demand; be it therefore enacted, that the said acts, so far as the same relate to the making void of *promissory notes, or drafts, or undertakings in writing, payable on demand to the bearer thereof,* for any sum of money *less than the sum of five pounds* in the whole; and also to restrain the publishing or uttering and negotiating of any such notes, drafts, or undertakings as aforesaid, shall, from and after the second day of March one thousand seven hundred and ninety-seven, be, and the same are hereby declared to be, to all intents and purposes, *suspended* until the first day of May next.

Sect. 3. And be it further enacted, “ that if any person
 “ liable to the payment of any of such notes, drafts, or
 “ undertakings in writing, as may be issued in pursuance
 “ of this act, shall neglect or fail to make full payment

^a Continued by 37 Geo. III. c. 61, s. 120.—38 Geo. III. c. 7.

“ in money of the sum or sums for which such notes,
 “ drafts, or undertakings in writing, shall be respec-
 “ tively given or issued, or so much thereof as shall be or
 “ remain due thereon respectively, by the space of three^b
 “ days after demand thereof made by the holder or holders
 “ of such notes, drafts, or undertakings in writing, it
 “ shall and may be lawful for any one or more of His
 “ Majesty’s justices of the peace for the county, riding,
 “ city, division, or place, where the person or persons re-
 “ spectively so refusing to pay any of such notes, drafts,
 “ or undertaking in writing, as last aforesaid, shall or may
 “ happen to be or reside, and such justice or justices is
 “ or are hereby required, upon complaint made by the
 “ holder or holders thereof, to summon the person or
 “ persons against whom such complaint shall be made,
 “ and after his, her, or their appearance, or in default
 “ thereof, upon due proof upon oath (and which oath
 “ such justice or justices is or are hereby empowered to
 “ administer), of such summons or warning having been
 “ given, such justice or justices shall proceed to hear and
 “ determine the said complaint, and award such sum to
 “ be paid by the person or persons respectively liable
 “ to the payment of every such note, draft, or under-
 “ taking in writing, to the holder or holders thereof, as
 “ shall appear to such justice or justices to be due thereon,
 “ together with such a sum for costs, not exceeding the
 “ sum of twenty shillings, as to such justice or justices shall
 “ seem meet ; and if any person or persons shall refuse or
 “ neglect to pay or satisfy such sum of money as upon such
 “ complaint as aforesaid shall be adjudged, upon the same
 “ being demanded, such justice or justices shall, by warrant
 “ under his or their hand and seal, or hands and seals,

^b Extended to seven days by the 37th Geo. III. c. 61, s. 2.

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“ cause the same to be levied by distress and sale of the
“ goods of the party so neglecting or refusing as aforesaid,
“ together with all costs and charges attending such dis-
“ tress and sale, returning the overplus, if any, to the
“ owner.”

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ERRATA.

Page 33, note ¹, insert—5 T. R. 485.

Page 56, l. 7, after the word *necessary*, insert—to subscribe the
name of the firm, or at least.

Page 75, l. 22, after *should*, insert—subscribe the name of the
firm, or.

Page 78, for *drawer*, read—drawee.

Page 92, l. 15, for *two*, read—four.

Page 131, note ^c, for sect. 17, read—sect. 7.

Page 136, l. 21—page 137, l. 20, 23—page 145, l. 4 from
bottom, *dele—check.*



